INDEX TO APPENDIX

	PAGE
Relevant Docket Entries	1a
Information	2a
Order of New York Court of Appeals	4a
Majority Opinion of New York Court of Appeals	6a
Dissenting Opinion of Chief Judge Fuld	18a
Order of Appellate Term, Supreme Court, First Department	23a
Majority Opinion of Trial Court	25a
Dissenting Opinion of Judge Basel	31a
Transcript of Proceedings in Trial	37a
Motion to Dismiss	55a, 112a
Transcript of Sentence	118a

TESTIMONY

People's Witness

John P. Burns—

Direct	39a
Cross	45a

PAGE

Defendant's Witnesses

Steven Radich—

Direct 76a

Cross 88a

Redirect 92a

Hilton Kramer—

Direct 98a

Cross 107a

Redirect 110a

Relevant Docket Entries

Date	*Proceedings*
12–27–66	Information.
3–29–67	Trial for Violating Section 136 of General Business Law—Decision Reserved.
5– 5–67	Defendant found guilty, Judge Basel dissenting; Sentenced to $500 or 60 days in jail.
6–13–68	Appellate Term of Supreme Court, First Department affirms conviction without opinion.
6–28–68	Leave to Appeal to New York Court of Appeals granted.
2–18–70	Decision of New York Court of Appeals affirming conviction.
2–18–70	Order of New York Court of Appeals affirming conviction entered.

Information

CRIMINAL COURT

OF THE CITY OF NEW YORK

Part 7B, County of New York

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

Patrolman John P. Burns of No. 19 Precinct, County of New York, City of New York, being duly sworn, deposes and says that on December 27, 1966 and December 28, 1966, at about 8:30 A.M. on December 27 and 5:30 P.M. on December 28 on second floor at 818 Madison Avenue in the County of New York. State of New York, the defendant STEPHEN RADICH did commit the crime of: did violate section 1425 of the New York State Penal Law, subdivision 16—Paragraph d and f, in that any person who shall publicly mutilate, deface, defile or defy, trample upon, or cast contempt upon the flag, standard, shield or ensign, of the United States of America, either by words or act or shall publicly carry or display any emblem, placard or flag which casts contempt, either by word or act, upon the flag of the United States of America:

under the following circumstances:

your deponent states that at the above location, the Radich Gallery, on December 27, 1966 at 8:30 A.M., he observed that the defendant did have on display, in a large window, facing the public sidewalk, the flag of the United States of America, in the form of a body hanging from a yellow noose. Deponent further states that on December 28, 1966 at about 5:30 P.M., at the above mentioned location, the

defendant did have on public display and for public viewing, the flag of the United States of America, in the following manner; 1—in the form of a male sexual organ, protruding from the body of form, in the anterior portion of the body of the form and depicting the erected male penis, protruding from a form of a cross. 2—the flag of the United States of America, wrapped in a chained bundle. 3—The standard of the United States on the form of an alleged elephant. 4—The Union of the flag of the United States of America, depicted in the form of an octopus. 5—The American flag attached to a gas meter. 6—The American flag wrapped around a bundle attached to a two wheeled vehicle. 7—The American flag in the form of a body, hanging from a yellow noose. Your deponent further states that the defendant is the owner and operator of the premises mentioned above.

Wherefore deponent prays that the defendant be dealt with according to law.

Sworn to before me
January 4, 1967

/s/ Ptl. John P. Burns
/s/ (Illegible)
Judge, Criminal Court of the City of New York

Order of Court of Appeals Below

COURT OF APPEALS

STATE OF NEW YORK, *ss.*:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 18th day of February in the year of our Lord one thousand nine hundred and seventy, before the Judges of said Court.

WITNESS,

THE HON. STANLEY H. FULD,

Chief Judge, Presiding.

RAYMOND J. CANNON,

Clerk.

REMITTITUR February 18, 1970.

App. T. 1. No. 368.

THE PEOPLE &c.,

Respondent,

vs.

STEPHEN RADICH,

Appellant.

BE IT REMEMBERED, That on the 22nd day of August in the year of our Lord one thousand nine hundred and sixty-nine, Stephen Radich, the appellant in this cause, came here unto the Court of Appeals, by Richard G. Green and Shirley Fingerhood, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the

judgment of the Appellate Term of the Supreme Court in and for the First Judicial Department. And The People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Richard G. Green, of counsel for the appellant, and by Mr. Jerry Slater, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Criminal Court of the City of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Criminal Court of the City of New York, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Criminal Court, before the Judges thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals
of the State of New York.

Majority Opinion of New York Court of Appeals

STATE OF NEW YORK

COURT OF APPEALS

THE PEOPLE &c.,

Respondent,

—v.—

STEPHEN RADICH,

Appellant.

OPINION

GIBSON, J.:

The issue is whether defendant's conviction of a violation of New York's flag desecration statute was in contravention of his right of free speech under the First Amendment to the Constitution of the United States. The particular penal provision found to have been violated provides, in substance, that any person who shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon the flag of the United States of America, either by words or act, shall be guilty of a misdemeanor (former Penal Law, §1425, sub. 16, par. d, now General Business Law, §136, subd. d). The constitutional question in respect of the proscribed defilement by an "act," rather than by "words," was expressly left open in *Street* v. *New York* (394 U.S. 576, 594), which reversed our affirmance of a conviction under this same statute (*People* v. *Street*, 20 N.Y.2d 231). We have concluded that the conviction in the case now before us infringed no constitutional guarantee.

The defendant, the proprietor of an art gallery in the City of New York, publicly displayed and exposed for

sale, certain "constructions," comparable to sculptures, which had been fashioned by an artist as expressive of protest against the Vietnam war and which, in each case, prominently incorporated the American flag.

The complaint, upon which defendant was charged and convicted, alleged, among other violations of the statute, that defendant publicly displayed the flag of the United States of America in the form of the male sexual organ, erect and protruding from the upright member of a cross; also, in the form of a human body, hanging from a yellow noose; and, again, wrapped around a bundle resting upon a two-wheeled vehicle, shown by photographs in evidence to resemble a gun caisson.[1]

For the purposes of this opinion it seems necessary to discuss only the first of the constructions complained of. Testifying in his own behalf, the defendant said that this was protest art; and that during the exhibition of the constructions, background music, consisting of war protest songs, was played from a tape. Asked, on cross-examination, as to the use of the flag for the purpose of protest, he said that the object extending from the vertical member of the cross and wrapped in a small flag was representative of a human penis; that tassels at the base of

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[1] The allegations, in full, were that "the defendant did have on public display and for public viewing, the flag of the United States of America, in the following manner; 1—in the form of a male sexual organ, protruding from the body of form, in the anterior portion of the body of the form and depicting the erected male penis, protruding from a form of a cross. 2—the flag of the United States of America, wrapped in a chained bundle. 3—The standard of the United States on the form of an alleged elephant. 4—The Union of the flag of the United States of America, depicted in the form of an octupus [*sic*]. 5—The American flag attached to a gas meter. 6—The American flag wrapped around a bundle attached to a two wheeled vehicle. 7—The American flag in the form of a body, hanging from a yellow noose."

this protrusion represented "probably * * * decorative or pubic hair, depending on what one decides it looks like to him." [2] Asked as to the particular expression and protest intended to be conveyed, the witness said that perhaps the penis represents the sexual act, which by some standards is considered an aggressive act; that organized religion is also symbolized by the figure, which seems to suggest that organized religion is supporting the aggressive acts suggested.

Only recently this court had occasion to give extended consideration to section 1425 of the former Penal Law and specifically to paragraph d thereof. In *People* v. *Street* (20 N.Y.2d 231, revd. 394 U.S. 576, *supra*) we affirmed the conviction of a defendant who, upon hearing of the shooting of the civil rights leader James Meredith, took an American flag to a street corner, burned it, saying, "We don't need no damned flag," and made other statements to people who gathered to watch these actions, one of these being the arresting policeman, to whom defendant said: "If they left that happen to Meredith, we don't need an American flag." The crux of the defense was that defendant's acts and speech were proper forms of protest legitimized by the First Amendment. Synopsizing Chief Judge Fuld's opinion upholding the conviction, we find the position of the court to be this: While nonverbal expression may be a form of speech within the protection of the First and Fourteenth Amendments, the same kind of freedom is not afforded to those who communicate ideas by conduct as to those who communicate ideas by

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[2] The "construction" was described in the majority opinion of the Criminal Court as "in the form of a large cross with a bishop's mitre on the headpiece, the arms wrapped in ecclesiastical flags and an erect penis wrapped in an American flag protruding from the vertical standard."

pure speech; that the State may legitimately proscribe many forms of conduct and no exception is made for activities to which some would ascribe symbolic significance; that, in sum, the cases show that the constitutional guarantee of free speech covers the substance rather than the form of communication, but that if the substance is being conveyed by a form violative of the public health, safety or well-being, then the First Amendment protection is subordinated to the general public interest. With regard specifically to the flag desecration statute it was squarely held that it was a valid statute in that, regardless of the major motivating factor behind its enactment, there was a clear legislative purpose to prevent a breach of the peace; that the Supreme Court long ago in *Halter* v. *Nebraska* (205 U.S. 34, 41) stated: "[I]nsults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot." This court said that our statute was designed to prevent the outbreak of such violence by discouraging contemptuous and insulting treatment of the flag in public.

The Chief Judge's opinion then noted that concededly defendant's acts arose out of indignation and a sense of outrage; that the act was one of incitement and as such threatened the public peace, a result which the State is legitimately interested in preventing. With regard to Street's purpose—to express indignation and protest—the parallel to the case before us is clear. Here, the expression, if less dramatic, was given far wider public circulation and, in consequence, perhaps, a measurable enhancement of the likelihood of incitement to disorder, by the placement of one of the constructions in a street display window of defendant's gallery on Madison Avenue in the

City of New York, and the exhibition and exposure for sale of the companion pieces in the public gallery and mercantile establishment within. Implicit in the invitation to view was the opportunity thereby afforded to join in the protest, or in counterprotest, with the consequent potential of public disorder; or so the trier of the facts could properly find.

The Supreme Court's reversal of *Street* (394 U.S. 576, *supra*) seems not to have questioned or disturbed the rationale enunciated there by Chief Judge Fuld. The majority felt that since it could not be determined what part of Street's conviction rested on the fact that he was charged with uttering constitutionally protected words and what part upon his act of setting fire to the flag, the conviction could not be upheld. The majority expressly left open the question concerning the validity of the conviction insofar as it was sustained on the basis that Street could be punished for flag burning "even though the burning was an act of protest" (p. 594).[3]

The dissenters considered that the few words that Street uttered were part of the act of symbolic conduct, from which they could not be separated, and thus posed an issue which the majority opinion should have met.[4]

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[3] Thus, Mr. Justice Harlan, writing for the majority, said: "[W]e reiterate that we have no occasion to pass upon the validity of this conviction insofar as it was sustained by the state courts on the basis that Street could be punished for his burning of the flag, even though the burning was an act of protest. Nor do we perceive any basis for our Brother WHITE's fears that our decision today may be taken to require reversal whenever a defendant is convicted for burning a flag in protest, following a trial at which his words have been introduced to prove some element of that offense." (*Street* v. *New York*, 394 U.S. 576, 594.)

[4] The salient points of dissent may be quoted as follows: CHIEF JUSTICE WARREN: "Since I am satisfied that the constitutionality of appellant's conduct should be resolved in this case and am convinced that this conduct can be criminally punished, I dissent."

While it seems well established that a clear violation of a valid statute may not be saved on First Amendment grounds, it is necessary in this case eventually to reach a somewhat different question, which is, whether or not the act said to constitute the violation is tempered by the application of the First Amendment. In other words, while burning, spitting upon and stomping upon the flag are clearly and inherently disrespectful, do we reach a point where other acts may be performed with regard to the flag which do not so easily admit of the requisite contemptuousness; where the intent behind the act may be of the purest sort, but where the results of the act may nevertheless have the effect which, as Chief Judge Fuld found in *Street*, the statute was validly designed to prevent—the arousement of passions likely to lead to disorder? Before considering that problem, and in aid of its solution, it would be well to examine several significant recent cases.

In *Hoffman* v. *United States* (256 A.2d 567 [Ct. of App., D. C., 1969]), the defendant, who was to testify before the House Un-American Activities Committee, upon approaching the House Office Building was arrested for desecrating the flag, in that he was wearing a shirt that resembled the American flag. He was convicted of breaching that part of the statute which proscribed defilement of the flag. On appeal to the District of Columbia Court of Appeals, Hoff-

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MR. JUSTICE BLACK: "The talking that was done took place 'as an integral part of conduct in violation of a valid criminal statute' against burning the American flag in public. I would therefore affirm this conviction." MR. JUSTICE WHITE: "For myself, without the benefit of the majority's thinking if it were to find flag burning protected by the First Amendment, I would sustain such a conviction." MR. JUSTICE FORTAS: "Protest does not exonerate lawlessness. And the prohibition against flag burning on the public thoroughfare being valid, the misdemeanor is not excused merely because it is an act of flamboyant protest." (394 U.S. 576, 605-617.)

man argued that the statute was vague, that he was entitled to First Amendment protection and that his acts did not constitute defilement since he undertook no physical destruction of the flag. On the vagueness question the court held that the statute admitted of that degree of reasonable certainty as to what could constitute a violation, so that it could not be said that a person possessing a reasonable degree of intelligence could not understand what conduct would be disrespectful to the flag and what conduct would not. The First Amendment argument was rather summarily disposed of, the court relying on the recently decided case of *United States* v. *O'Brien* (391 U.S. 367), a draft card burning case hereinafter discussed. Finally, the court held that wearing the flag, or part of it, as a shirt was a rather clear act of defilement in that the flag was thus dishonored; that the idea of dishonorment was the key to the question whether the flag was defiled. The court concluded (256 A.2d 567, 570) "that the use of the word 'defile' in the subject Statute was intended to include public conduct which brings shame or disgrace upon the flag by its use for an unpatriotic or profane purpose. It is our opinion that the wearing of a shirt which resembles the American flag, under the circumstances of this case, is a physical act which defiles the flag in violation of 18 U.S.C. §700. Such a use of the flag would 'degrade and cheapen the flag in the estimation of the people, as well as to defeat the object of maintaining it as an emblem of national power and national honor'. (*Halter* v. *Nebraska*, 205 U.S. 34, 42)." Similarly, in *People* v. *Cowgill* (—— Cal. App. 2d ——[78 Cal. Rptr. 853], app. dsmd. —— U.S. —— [38 U.S. Law Week 3266; Jan. 19, 1970]), the California court affirmed the conviction of a defendant for

wearing a vest fashioned from a cut-up American flag, in violation of a flag defilement statute, the court posing and then answering affirmatively the question left open in *Street* (*supra*), whether the States have power to protect the flag from acts of desecration and disgrace.

It is necessary to make reference, also, to the draft card burning cases of *United States* v. *Miller* (367 F.2d 72, cert. den. 386 U.S. 911) and *O'Brien* v. *United States* (376 F.2d 538). In *O'Brien,* the First Circuit held that a 1965 amendment to title 50 (§462, subd. [b]) of the United States Code, proscribing destruction of draft cards, was an unconstitutional abridgement of freedom of speech. The Supreme Court disagreed in *United States* v. *O'Brien* (391 U.S. 367, *supra*). The only dissent was that by Justice Douglas. The court, through Chief Justice Warren, noted that the statute on its face deals with conduct having no connection with speech. "It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct. * * * A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records." (391 U.S. 367, 375.) It should be noted that O'Brien publicly burned his card on the South Boston Courthouse steps, a crowd having been attracted by his and his companions' activities. The draft card statute, like the flag statutes, had a legitimate reason behind its enactment.

One of O'Brien's contentions was that the action he took with his draft card was a communication of ideas by conduct and that this conduct expressed his position as re-

gards the war and the draft. As to this the court stated: "However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. * * * a governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; *if the governmental interest is unrelated to the suppression of free expression*; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." (391 U.S. 367, 376, 377; emphasis supplied.) Of those requisites the flag desecration statute need only be considered with respect to the one above emphasized.

The discussion thus far enables us to reach certain conclusions. It becomes clear, upon considering Chief Judge Fuld's statement in *Street* (20 NY 2d 231, *supra*), along with the authorities there cited, and the more recent cases discussed just above, that a person with the purest of intentions may freely proceed to disseminate the ideas in which he profoundly believes, but he may not break a valid law to do it. The flag statute has been repeatedly held valid from the *Halter* case (*supra*) on down, even through *Hoffman* v. *United States* (*supra*) and *People* v. *Cowgill* (*supra*), where the flag was not, in either case, burned, spit or trampled upon, but was used, in each case, to further political or ideological viewpoints by employment as an article of clothing. There appears no significant difference between those situations and the one we are here considering. The defendant may have a sincere ideological viewpoint, but he must find other ways to express

it. Whether defendant thinks so or not, a reasonable man would consider the wrapping of a phallic symbol with the flag an act of dishonor; he would consider the hanging effigy a dishonor; and to a lesser and more debatable extent it might be found that wrapping the flag in chains, attaching it to a gas meter, and fashioning the other representations involved, were acts dishonoring the flag. The exhibitor who, as in this case, engages to join the artist in the commercial exploitation of the supposed expression of protest stands in no better position.

There appears to be one further question with respect to the First Amendment which the *O'Brien* court (391 U.S. 367, *supra*) was not especially concerned with, having found the draft card law based upon the valid reason that registrants should be required to retain their cards simply to facilitate administration of the act. This question concerns itself with the requirement in *O'Brien*, emphasized above, that the government interest be unrelated to the suppression of free expression.

The *Halter* case (205 U.S. 34, *supra*), at which any investigation of the validity of flag statutes must begin, was decided at a time before the Supreme Court was as concerned with First Amendment rights as it is today. Thus, the effect of *Stromberg* v. *California* (283 U.S. 359), the case cited by the majority in reversing the *Street* conviction (394 U.S. 576, *supra*), deserves consideration. Miss Stromberg conducted a daily ceremony at a children's summer camp during which the children raised the Soviet flag and recited a pledge of allegiance to it. The California statute made it a criminal offense to display a red flag (1) as a symbol of opposition to organized government, or (2) as an invitation to anarchistic action, or (3) as an aid to propaganda of a seditious character. Miss Strom-

berg was convicted under the statute, although it was not made clear which of the three criteria were involved in the breach. The court reversed on the ground that if defendant was convicted for flying the flag as a symbol of opposition, her First Amendment right to freedom of expression had been breached.

However, the statutes prohibiting certain kinds of exhibition of foreign flags, and statutes requiring the salute to our flag (cf. *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624) are clearly designed for no other purpose than communicative suppression whereas a flag desecration statute is aimed at keeping the public peace. While it is true that violations of the flag desecration statute will probably not occur apart from the expression of an idea, the prime reason for the statute was not to insure suppression of such ideas, but rather to insure preservation of the public peace. The *Halter* case (205 U.S. 34, *supra*) still expresses the law as rephrased in *Street* (20 N Y 2d 231, 236, *supra*), where it is stated: "In any event, whatever motivated the Legislature to act, the statutory purpose is clear—it is to prevent a breach of the peace." Some enlightenment may also be gained from the implication to be drawn from the *Stromberg* case (283 U.S. 359, *supra*) that had defendant's conviction rested specifically on either or both of the statutory prohibitions relating to anarchistic or seditious actions, it might have been upheld. We thus conclude that the statute before us does not breach the *O'Brien* requirement (391 U.S. 367, 377, *supra*) that the governmental interest served by it must be unrelated to the suppression of free expression; and we affirm the lower court's conclusion that the legitimate public interest which the statute is designed to protect was threatened by the violation of which defendant was convicted.

Appellant's additional contentions are insubstantial and may be dealt with summarily. The statute is not unconstitutionally vague; and at least two of the "constructions" clearly cast the flag into dishonor. (*Hoffman* v. *United States*, 256 A.2d 567, *supra*; *People* v. *Cowgill*, —— Cal. App. 2d —— [78 Cal. Rptr. 853], app. dsmd. —— U. S. —— [38 U.S. Law Week 3266; Jan. 19, 1970], *supra*.)

Another argument is addressed to the factor of intent; but even if we assume that defendant had an honest political intent in exhibiting these constructions, or that he had no intent at all, that element is not essential to a conviction of violating a statute which is *malum prohibitum*. (*People* v. *Werner*, 174 N.Y. 132, 134; *People* v. *Kibler*, 106 N.Y. 321, 322-323.)

No less tenuous is appellant's claim of denial of equal protection, predicated on the provision exempting from the operation of the statute "a certificate, diploma, warrant, or commission of appointment to office, *ornamental picture*, article of jewelry, stationery * * * or newspaper or periodical, on any of which shall be printed * * * said flag * * * disconnected and apart from any advertisement" (former Penal Law, §1425, subd. 16; emphasis supplied); and equally insubstantial, is his contention based on the grammatical imperfection apparent in paragraph d of subdivision 16, it being clear beyond dispute that "flag" is the intended object, as it is the explicit object of every other act inhibited by the statute.

The order should be affirmed.

Dissenting Opinion of Chief Judge Fuld

I cannot agree with the majority that sufficient legitimate public interest is served by preventing the sale and exhibition of works of art—such as those which formed the predicate for the conviction of the defendant Radich—to justify interference with his right to free expression.

The defendant was the proprietor of a second-floor art gallery on Madison Avenue in New York City. He exhibited for sale seven sculptures, termed "constructions," by an artist named Marc Morrel, in which the latter made use of American flags—or what appeared to be parts of such flags—in various provocative shapes and forms to express protest particularly against the Vietnam War. (See Life Magazine, March 31, 1967, p. 22.) The defendant was charged with defiling and casting contempt upon the flag of the United States, in violation of section 1425, subdivision 16, of the former Penal Law.[1]

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[1] Insofar as relevant, subdivision 16 of section 1425 (now General Business Law, §136) provided:

"16. Any person, who * * *

"d. Shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon * * * by * * * act, or

"f. Shall publicly carry or display any emblem, placard or flag which casts contempt, either by word or act, upon the flag of the United States of America, * * *

* * * * *

"Shall be deemed guilty of a misdemeanor; * * *

"The words flag, standard, color, shield or ensign, as used in this subdivision or section, shall include any flag, standard, color, shield or ensign, or any picture or representation, of either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be * * * said flag, standard, color, shield or ensign, of the United States of America * * * or a picture or a representation * * * thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to repre-

Dissenting Opinion of Chief Judge Fuld

At the trial, the Art News Editor of the New York Times testified that he considered the sculptures or constructions to be works of art, more specifically, a form of "protest art" which (he added) was a long established type of art, exemplified by the works of such artists as Michaelangelo, Goya and Picasso. The defendant also testified, stating that, although the works express a political viewpoint, neither he, nor the artist intended to defile or cast contempt upon the flag. It was his belief, he asserted, that the artist, far from intending to do so, was seeking, rather, to convey the idea that others were contemning the flag by committing aggressive acts in its name.

The court, in affirming the conviction, places primary reliance upon *People* v. *Street* (20 N. Y. 2d 231, revd. on other grounds, 394 U.S. 576) in which we held that the State may legitimately circumscribe certain acts which are contemptuous of the flag. (See *People* v. *Street*, 24 N Y 2d 1026, 1028.) However, there is nothing in our opinion in that case which suggests that the mere fact that a person chooses to express himself by other than verbal means removes him entirely from the protections of the First Amendment. On the contrary, we wrote as follows (20 N Y 2d, at p. 235):

> "It is the teaching of the cases that the constitutional guarantee of free speech covers the substance rather than the form of communication and that the right to employ a particular mode of expression will be vindicated only if it has been outlawed not because of any

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sent the flag, colors, standard, shield or ensign of the United States of America * * *.

"This subdivision shall not * * * be construed to apply to a[n] * * * ornamental picture * * * on * * * which shall be printed, painted or placed, said flag, standard, color, shield or ensign disconnected and apart from any advertisement."

> legitimate State interest, but solely for the purpose of censoring the underlying idea or thought."

In other words, in the absence of a showing that the public health, safety or the well being of the community is threatened, the State may not act to suppress symbolic speech or conduct having a clearly communicative aspect, no matter how obnoxious it may be to the prevailing views of the majority. (See, e.g., *Tinker* v. *Des Manes*, 393 U.S. 503, 505, 509; see, also, Note, 68 Col. L. Rev. 1091; cf. *Cowgill* v. *California*, —— U.S. ——, 38 USLW 3266 [decided Jan. 19, 1970], *per* Harlan, J., concurring in dismissal of appeal.)

Quite obviously, the act which was prosecuted in the *Street* case—the public burning of a flag on a street corner in the Bedford-Stuyvesant section of Brooklyn—posed a threat to public order which the State could legitimately act to prevent. Indeed, we likened the public mutilation of a flag to "shouting epithets at passing pedestrians" (20 N Y 2d, at p. 237), a situation patently fraught with danger to the public peace. The same may not, however, be said of the art forms which the defendant before us displayed in the quiet surroundings of his upstairs art gallery on Madison Avenue in midtown Manhattan. In our modern age, the medium is very often the message, and the State may not legitimately punish that which would be constitutionally protected if spoken or drawn simply because the idea has been expressed, instead, through the medium of sculpture.

Unlike the situation in the recent case of *Cowgill* v. *California* (—— U.S. ——, 38 USLW 3266, *supra*),[2] the

[2] In *Cowgill*, where there was no showing that the use of a cut-up, mutilated American flag was motivated by a desire to express a particular philosophy or point of view—where, in other words, the

artist in the present case unquestionably made use of the flag for the purpose of expressing his political philosophy or views, his dissatisfaction with, and opposition to, the Vietnam War and other activities carried on by the Government. The challenged "constructions" were, in effect, but three-dimensional political cartoons. It is quite true that one's political motives may not be relied upon to justify his participation in an activity which is otherwise illegal. But it is equally true that an activity which is otherwise innocent may not be treated as criminal solely because of its political content.

Subdivision 16 expressly exempts from prosecution the display of the flag in "ornamental pictures," and, presumably, this exemption would apply to other forms of art as well. It is evident that the only reason why these works of Morrel were singled out for prosecution was not because the flag was used in the sculptures but solely because of the particular political message which those sculptures were intended to convey. In a very real sense, therefore, it was not the artist's *act* of making use of the flag which is being punished but solely the protest or the political views he was seeking to express thereby.

I have spoken principally of the artist who made the constructions in question. There is even less justification for proceeding against the owner of the gallery in which the works were being exhibited for sale, particularly in view of the absence of any proof that he himself actually intended to defile or cast the flag in contempt. Although it is true that intent need not be an element of a crime—providing it is considered *malum prohibitum*—this is not

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display had no "recognizable communicative aspect"—the court held that no substantial First Amendment question was presented. (See *Cowgill* v. *California*, —— U.S. ——, 38 USLW 3266, *supra*.)

the case where the challenged conduct involves the expression of political views. The First Amendment is designed not merely to prevent prosecutions but to actively encourage and foster the free dissemination of ideas. Thus, even activity which is not, in itself, subject to the protection of the First Amendment may not be prosecuted in a manner which will have a chilling effect upon the free dissemination of ideas. (See, e.g., *Smith* v. *California*, 361 U.S. 147.)[3]

In sum, I do not understand how it may reasonably be said that the mere display of Morrel's constructions in an art gallery, distasteful though they may be, poses the type of threat to public order necessary to render such an act criminal. This prosecution, in my view, is nothing more than political censorship falling far outside our holding in *People* v. *Street*, and may not be constitutionally sustained.

The judgment appealed from should be reversed.

* * * * *

Judgment affirmed. Opinion by Gibson, J. All concur except Fuld, Ch. J., who dissents and votes to reverse in an opinion in which Burke, J., concurs.

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[3] In the *Smith* case (361 U.S. 47), the court held that a bookseller could not be prosecuted for the sale of obscene material unless he was shown to be aware of the contents of the books. The rationale behind that decision—that absolute liability for the dissemination of unprotected material would chill the distribution of legitimate works which were subject to constitutional protection—is, it seems, to me, equally applicable here.

Order of Appellate Term, Supreme Court, First Department

At an Appellate Term of the Supreme Court, First Department, held on the County Court House, Borough of Manhattan, City of New York, on the 13th day of June, 1968.

PRESENT:

HON. WILLIAM C. HECHT, JR. JP
HON. SAMUEL H. HOFSTADTER
HON. JACOB MARKOWITZ

Justices.

February—No. 20

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—vs.—

STEPHEN RADICH,

Defendant-Appellant.

An appeal having been taken to this court by defendant from a judgment of conviction of the Criminal Court of the City of New York, County of New York, after trial before Hons. Basel (dissenting), Strong and Comerford, on the 5th day of May 1967, upon the charge of violation of Penal Law, Section 1425, Subd. 16(d), and having been sentenced by Hons. Basel, Strong and Comerford on the 5th day of May, 1967, as follows:

$500.00 or 60 days Workhouse

Order of Appellate Term, Supreme Court, First Department

and the said appeal having been heard and due deliberation having been had thereon,

IT IS ORDERED AND ADJUDGED that the said judgment so appealed from be and the same is hereby affirmed.

Enter

W.C.H. Jr.
Justice Appellate Term
Supreme Court, First Department

Majority Opinion of Trial Court

STRONG, P.J.

The defendant, an art dealer, publicly exhibited for sale at his gallery from December 13, 1966 to January 17, 1967, thirteen three-dimensional objects called "constructions." One of these objects (People's Exhibit 2) was in the display window and consisted of an American flag stuffed and shaped in a form suggesting a human body hanging from a yellow noose around its neck. Among the twelve other "constructions" inside the gallery was one (People's Exhibits 3 and 4) in the form of a large cross with a bishop's mitre on the headpiece, the arms wrapped in ecclesiastical flags and an erect penis wrapped in an American flag protruding from the vertical standard. Other "constructions," all making use of the flag stuffed in various shapes, are described in the complaint herein and portrayed in the photographic exhibits.

This prosecution is brought under paragraphs (d) and (f) of subdivision 16 of Section 1425 of the Penal Law of the State of New York, originally enacted in 1903, which provides as follows:

> "16. Any person, who
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> • • •
>
> "d. Shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act, or
>
> • • •
>
> "f. Shall publicly carry or display any emblem, placard or flag which casts contempt, either by word or act, upon the flag of the United States of America, or
>
> • • •

"Shall be deemed guilty of a misdemeanor;

• • •

"The words flag, standard, color, shield or ensign, as used in this subdivision or section, shall include any flag, standard, color, shield or ensign, or any picture or representation, of either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of, said flag, standard, color, shield or ensign, of the United States of America, or of the state of New York, or a picture or a representation of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, colors, standard, shield or ensign of the United States of America, or of the state of New York.

"This subdivision shall not apply to any act expressly permitted by the statutes of the United States of America, or by the United States army and navy regulations, nor shall it be construed to apply to a certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, stationery for use in private correspondence, or newspaper or periodical, on any of which shall be printed, painted or placed, said flag, standard, color, shield or ensign disconnected and apart from any advertisement."

The defendant moves after trial to dismiss the complaint on the ground that the facts as established do not constitute a violation of the statute and further that, in any case, the statute is unconstitutional for denial to the de-

fendant of free speech, equal protection of the laws, and, because of vagueness, due process of law. Factually, the defendant contends that the "constructions" are a form of sculpture of a kind known as "protest art" and that no contempt for the flag was intended either by the artist or by himself. With particular reference to the cross-form, he claims that it expresses opposition by the artist to what he considers church-condoned American aggressive warfare in Vietnam as symbolized by the flag-wrapped phallus.

We hold that these so-called "constructions" constitute a contemptuous use of the flag of the United States and that the defendant by exhibiting them to the public cast contempt upon it in violation of paragraph (d) of the statute under which this proceeding was instituted. It will not do for the defendant to say that paragraph (d) by itself does not contain an object. Subdivision 16 must be read as a whole, and it is clear that the intended object is contained in the next paragraph, lettered "e", in the words "any such flag, standard, color, shield or ensign." We do not find paragraph (f) to be applicable to the facts presented here.

We further hold that these so-called "constructions" are not within the protection of the exclusionary paragraph of the statute. "Sculpture," if such these objects be, is not expressly exempted, and we see no valid basis for construing an implied exemption for it on the ground urged by the defendant that, "pictures" being expressly excepted, the omission of "sculpture" was a legislative inadvertence. In any case, it is important to note that only pictures termed "ornamental" are exempted, and we are not prepared to find that the subjects of this prosecution are "ornamental" even by contemporary community standards. It seems clear to us that the legislative intent was to protect from

prosecution the printed, painted, or affixed use of the American flag solely for ornamental, as distinguished from advertising, purposes. There is nothing in the statutory language to indicate that the legislature was concerned with the application of the First Amendment. As to these "constructions," it is, therefore, in our opinion of no consequence whether or not the word "pictures" in the exclusionary paragraph be deemed to embrace sculptures.

Obviously this case raises constitutional questions of fundamental importance. As a trial court, we must especially recognize the presumption supporting the validity of duly enacted legislation. The People having no right of appeal from an acquittal, we should not strike down this staute in the absence of a clear and overwhelming showing that it violates one or another of the guarantees set forth in the Bill of Rights. We fail to find such a decisive showing of unconstitutionality.

We do not find the statute here to constitute class legislation clearly in violation of the equal protection clause of the Fourteenth Amendment. As we have pointed out above, the section does not discriminate between pictures generally and sculpture generally. Only "ornamental" pictures are excepted. The legislature did not intend to say that pictures desecrating the flag would be exempted as a basis for prosecution and that similar sculpture would not be so protected. Any contemptuous use of the flag comes within the purview of the statute, whether two-dimensional or three-dimensional. We find in this statute no arbitrary discriminatory classification.

We cannot find that the freedom of speech guarantee of the First Amendment includes a license to desecrate the flag. It is inconceivable to us that the authors of the Bill of Rights could have intended that the protection of the

First Amendment could or should be stretched so far. The language of the Circuit Court of Appeals in *United States* v. *Miller*, 367 Fed. 2d at 79 (cert. denied), a draft card burning prosecution, is apropos. The Court there said: "* * * sincere motivation or the labeling of even non-violent conduct as symbolic does not necessarily transform that conduct into speech protected by the First Amendment."

In the exercise of its police power, a State may restrict acts which pose an "immediate threat to public safety, peace or order" (*Cantwell* v. *Conn.*, 310 U.S. 296 at 308). In *Halter* v. *Nebraska*, 205 U.S. 34, 41, the Supreme Court, in upholding a statute similar to that involved here as applied to the use of the flag in advertising, said:

> "From the earliest period in the history of the human race, banners, standards and ensigns have been adopted as symbols of the power and history of the peoples who bore them. * * * Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot."

It seems to us that the prohibited use of the flag in advertising is less of a desecration and therefore less of a threat to public order than the use and exhibition of it in the so-called "constructions" here involved.

The United States Supreme Court decisions, cited by the defendant, in *West Virginia* v. *Barnette*, 319 U.S. 624, *Stromberg* v. *California*, 283 U.S. 359, and *Terminiello* v. *Chicago*, 337 U.S. 1 (cf. *Feiner* v. *New York*, 340 U.S. 315), arose from such different facts and statutes that we do not find them determinative of the issue here involved. In any

case, we do not presume to make a final determination as to "where the individual's freedom ends and the State's power begins." The Supreme Court has said that our system places that duty upon it (*Thomas* v. *Collins*, 323 U.S. 516, 529).

In our opinion the language of the statute involved here is not so vague as to violate the due process clause of the Fourteenth Amendment. It seems to us clear enough to apprise any person of ordinary intelligence as to what it permits and what it prohibits. If he wishes to approach the brink of what is proscribed, he necessarily gambles on an adverse finding by the Court. Since we find the statute to constitute "*malum prohibitum*," no criminal intent to violate it is prerequisite to conviction. *People* v. *Boxer*, 24 N.Y.S.2d 628, 632.

Holding, as we do, that the act of the defendant in publicly exhibiting these so-called "constructions" cast contempt upon the flag of the United States and that no exception in the statute here involved exempted it and, further, that the statute as here applied does not clearly violate any constitutional provision, we find him guilty of the charge against him as set forth in paragraph (d) of subdivision 16 of Section 1425 of the Penal Law of the State of New York.

Comerford, J. concurs in this opinion.

Basel, J. dissents in his own opinion.

Dissenting Opinion of Judge Basel

Defendant Radich is charged with a misdemeanor by reason of exhibiting and offering for sale in his art gallery a form of sculpture called "constructions" designed of American flags in forms described in the majority opinion. Defendant's gallery is well established in the New York art world. The exhibition was reviewed by art critics including the critic for The New York Times and was treated as a serious artistic offering. The works complained of, when displayed, were accompanied by a musical background of taped anti-war songs. The sound must be considered part of the exhibit. Modern artists often use additional media to accompany their visual creations to express their ideas more completely and to create a total effect. It is in the context of the anti-war theme, the statement the artist attempts to make must be judged. Defendant describes his efforts as "protest art." The creator of this work specifically protests America's participation and leadership in the Vietnam war.

There are many Americans in opposition to the war, who revere the flag and to whom, "it signifies government resting on the consent of the governed, liberty regulated by law, the protection of the weak against the strong, security against the exercise of arbitrary power and absolute safety for free institutions against foreign aggression." *Halter* v. *Nebraska*, 205 U.S. 34, 43. These loyal dissenters vehemently, honestly and passionately oppose U.S. intervention in Vietnam. They have devised varied means to express their opposition. This group argues, and many are veterans who fought to protect the flag, that the flag is being placed in contempt by our "aggression" and persistence in this war. They protest that the image of the American flag as a symbol of freedom to lovers of liberty

and a shining object to the oppressed is cast in contempt. This is the message the artist seeks to convey, in the work defendant exhibited. We may quarrel with his theme, disagree with his method, condemn his goal. We cannot dispute his right to express dissent even though the means be loathsome to us. " . . . laws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men." *Board of Education* v. *Barnette*, 319 U.S. 624, p. 644. We can also not ignore the fact that large groups of Americans agree with his dissent, as witness the recent march of 100,000 upon the U.N. " . . . freedom to differ is not limited to the things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *Board of Education* v. *Barnette*, *supra*, p. 642.

It is not the dissent for which defendant is prosecuted, we are told, it is the method that is condemned. It is the fact that the artist whose work defendant exhibits has chosen as his means of expression, to defile the flag by hanging it in effigy, draping it in chains, shaping it as a phallus on a cross, this opposition may no longer be characterized as free expression, it is contemptuous conduct. The sculptor cannot declare his dissent in this form, it is argued, because it violates and shames the symbol of our land and is thus a crime as defined in Penal Law Sec. 1425, Subdivision 16(d) and (f).

Defendant contends artist is not showing contempt for the flag. He supports what it symbolizes, liberty, equality, freedom, but he protests by means of these "constructions" that those virtues have been abandoned by United States conduct in Vietnam. The ideals the flag represents, he

argues, are enchained, its inspiration publicly hangs in shame before the world, and the church and state are jointly to be charged as violators of the innocent. He makes that protest visible, it takes sculptural form.

It is essential that legislation which is criminal in character be clearly drawn and precise so that those enforcing it will know its meaning and those subject to it can clearly regulate their conduct. If such legislation has a tendency to impair or impede free speech it must be judged ultra carefully. *Winters* v. *New York*, 333 U.S. 507, 509; *Stromberg* v. *California*, 283 U.S. 359; *Herndon* v. *Lowry*, 301 U.S. 242. As Judge Learned Hand said in *Masses Publishing Co.* v. *Patten*, 244 Fed. 535, 540: "Assuming that the power to express such opinion, (hostile criticism) may rest in Congress in the throes of a struggle for the very existence of the state, its exercise is so contrary to the use and wont of our people that only the *clearest* expression of such a power justifies the conclusion it was intended." Section 1425, subdivision 16(d) reads in full: "Shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words, or act." It does not describe the object of this condemnation. Although a reading of the full statute (all of Section 1425, subdivision 16 might suggest it was a flag that was the legislature's concern, "16(d)" does not say sc and it is the only subsection in 1425 (16) which omits the word "flag." It would be novel criminal law to convict anyone under such a statute, to read the word flag into it in order to obtain a conviction is in my view clearly unconstitutional.

The prosecution and the question is thus narrowed and confined to the validity of subsection 16(f) "shall publicly carry or display any emblem, placard or flag which casts contempt, either by word or act upon the flag of the United States of America."

Who shall be the judge of what *word* or *act* is contemptuous? Which *act*, what *words* constitute contempt?

"The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime must be defined with appropriate definiteness." *Cantwell* v. *Conn.*, 310 U.S. 296; *Pierce* v. *U. S.*, 314 U.S. 306, 311. "There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of an enactment . . ."

Winters v. *N. Y.*, 333 U.S. 507, 518. *U. S.* v. *Cohen Grocery Co.*, 255 U.S. 81.

In *Herndon* v. *Lowry*, supra, p. 263, the Supreme Court said: "The statute, as construed and applied, amounts merely to a dragnet which may enmesh anyone who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect in the future conduct of others. No reasonably ascertainable standard of guilt is prescribed. So vague and indeterminate are the boundaries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment." See also *People* v. *Bookcase, Inc.*, 14 N.Y. (2) 409, *People* v. *Kahan*, 15 N.Y. (2) 311.

The statute in the instant case is drawn so broadly and is so vague that any words or any acts to which someone in authority takes offense can be deemed criminal. " . . . the constitutionality of a statute governing publications is to be tested by what *can* be done under it and not by the *particular* violation which is charged with having occurred." *People* v. *Bookcase*, supra, p. 418. The 100,000 who marched upon the U.N. are critical of the uses to which the flag is being put in Vietnam, as are Senator Fulbright, Senator

Hatfield and thousands of others. Are they guilty of crime if they *say* the flag has been placed in chains by United States conduct? No one would seriously argue they be jailed for expressing verbally or in writing what the artist here makes visual. I agree with defendant's art expert that the artist's talent is limited, his symbolism obvious, cliche and lacking in imagination. I acknowledge he has chosen a means of expression in extreme poor taste and shabby in form. But is he to be punished for his lack of manners and his vulgarity when his intention is a serious condemnation of our present foreign policy? Who is to judge under this statute if what he did is unlawful? If those who marched in opposition are his judges, it is doubtful they will find his conduct contemptuous. If those who hurled insults at the parade were on his jury, they would almost certainly find him guilty. "A person gets from a symbol the meaning he puts into it." *Board of Education* v. *Barnette*, supra, p. 633. "It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." *U. S.* v. *Cohen Grocery Co.*, supra, p. 89. The legislature has established standards so vague, indefinite, imprecise and subjective, the statute under discussion should be held unconstiutional. As Chief Justice Hughes said in *Stromberg* v. *California*, supra, p. 369, "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system. A statute which upon its face . . . is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment."

Dissenting Opinion of Judge Basel

Halter v. *Nebraska*, supra, relied upon by the People and the majority opinion and followed in *People* v. *Picking*, 288 N.Y. 144, is distinguishable. In a recent case involving disrespect for the flag, in Federal District Court, Southern District, although the court did not take jurisdiction for procedural reasons, it said: " . . . the substantive constitutional issues are not insubstantial. This view can scarcely be altered by *Halter* which was decided several years before the protections of the First Amendment were held firmly applicable to the states through the Fourteenth Amendment. However, the argument that the statute is unconstitutional for vagueness was notably absent in the *Halter* case." P. 7. *Dunncombe* v. *State of N. Y.*, U.S. DC So. Dist. N.Y. 67, Civ. 1085 April 11, 1967, Bryan, J. *Halter* also passed only on the advertising provisions of Section 1425. These are more carefully drawn than 1425, 16(d) and (f), and are more detailed and not vague. *Halter* is further distinguished by the fact that advertising is not yet protected by the First Amendment.

The other argument advanced by defendant, that the statute intends to exempt all forms of expression as protected by the First Amendment and that all sculpture as well as all painting is included in the descriptive term in the statute, "ornamental painting," does not require discussion in view of the opinion here expressed as to the unconstitutionality of the statute.

The motion to dismiss should have been granted and the defendant found not guilty. I dissent from the majority view.

Transcript of Proceedings in Trial

CRIMINAL COURT
OF THE CITY OF NEW YORK

PART 2B[3], COUNTY OF NEW YORK

Docket: B 196

Charge: 1425 P.L.

PEOPLE OF THE STATE OF NEW YORK,
on the Complaint of
PATROLMAN JOHN P. BURNS,

—VS—

STEPHEN RADICH,

Defendant.

March 29, 1967

BEFORE:

HON. AMOS S. BASIL,
" FREDERICK L. STRONG,
" JAMES J. COMERFORD,

Judges

APPEARANCES:

FOR THE PEOPLE:

GERALD SLATER
Assistant District Attorney
New York County

FOR THE DEFENDANT:

RICHARD G. GREEN
1270 Avenue of the Americas
New York, New York

ALSO PRESENT:

SHIRLEY FINGERHOOD

COURT OFFICER:

MICHAEL JAY KUGLER
Official Court Reporter

[2] Court Officer: 35, Docket B 196, Stephen Radich, violation 1425 of the Penal Law, subdivision B and F, on the complaint of Patrolman Burns, 19th Precinct. Defendant represented by counsel.

Mr. Green: Richard G. Green and Shirley Fingerhood, 1270 Avenue of the Americas, for the defendant.

Mr. Slater: People ready.

Court Officer: Defendant ready?

Mr. Green: The defendant is ready.

Court Officer: First witness, step up, please.

Judge Basel: Do you swear the testimony you are about to give in this case will be the truth, the whole truth and nothing but the truth, so help you God?

Officer Burns: I do.

PATROLMAN JOHN P. BURNS, having first been duly sworn, testified as follows:

[3] Court Officer: Give your name, shield and assignment, Patrolman.

A. Patrolman John P. Burns, 21038, 19th Precinct.

Mr. Green: Excuse me, if the Court wishes, I would like to submit a memorandum at this point. I have it in triplicate for the Court.

Mr. Slater: I just want to state, your Honor, this is the first time I have seen this memorandum.

Direct Examination by Mr. Slater:

Q. Officer Burns, on December 27th, 1966, at about 8:30 A.M., were you on duty? A. I was.

Q. At that time were you in uniform? A. I was.

Q. Were you in the vicinity of premises 818 Madison Avenue, City, State, County of New York? A. I was.

Q. Did you make any observations? A. Yes, I did.

[4] Q. What did you observe? A. On the second floor of a four story building I observed in the window what appeared to be the flag of the United States Government in a shape of a human body, hanging from a yellow noose.

Judge Strong: What?

A. It was hanging from a yellow noose, your Honor.

Q. Did you see any thing else in this window? A. Not at the time, no.

Q. Did you return to this area the following day, this is, on December 28th, 1966, is that correct? A. I did.

Q. About what time was this when you returned? A. In the evening, about 5:00 o'clock.

Q. When you returned, did you go into the premises? A. I did.

Q. What occurred there? A. I entered the premises with another member of the force, Patrolman Myrich, I believe, from the photo unit, and I had with me a Court summons which I had obtained from the previous day from 52 Chambers Street. [5] As I entered the premises ion the second floor I observed the defendant, Mr. Radich, in conversation with an unknown female. I identified myself to Mr. Radich and I asked him if he was the artist stipulated on the entrance of the building, marked Merrell. He told me he was not, that his name was Stephen Radich, that he was the proprietor of the gallery. I told him I observed the violation of 1425 of the Penal Law, and I served a Court summons upon him.

Q. Did you have any other conversation with the defendant at this time? A. Yes. I believe I asked him—

Q. Do you understand, Officer? A. Yes. I asked him

if the artist marked Merrell was about and he said he was not. And I asked him if he anticipated his arrival, and he said he wasn't sure, that he came in intermittently. And I asked him if these objects of art were for sale. He said there was no price for them, any benefit derived from them he would share in the profits.

Q. Did the defendant say anything else? A. I told him we would take photos of the displays [6] and he didn't object, and that's all the conversation we had.

Q. Were photos taken on December 28th, 1966 in these premises? A. Yes, they were.

Q. Officer, I ask you to look at this picture. Please indicate when you've examined it to your satisfaction. A. All right.

Q. Officer, is this photograph a fair and accurate representation of the condition of the premises 818 Madison Avenue, Manhattan, as you observed it on December 27th and 28th, 1966? A. Yes, it is.

Q. I ask this photograph be received at this time as People's Exhibit 1. I am showing same to counsel for the defendant.

Mr. Green: No objection.

Judge Strong: Counselor, will you approach the bench.

Q. Officer, I ask you to examine this second photograph. Please indicate when you've examined it [7] to your satisfaction. A. All right, I've examined it.

Q. This photograph, is it a fair and accurate representation of an object which you say you saw in the premises 818 Madison Avenue on December 28th, 1966 while in the premises of this defendant? A. Yes, it is.

Mr. Slater: I ask at this time that this photograph be received in evidence as People's 2 in Evidence, showing same to counsel for defendant.

Mr. Green: No objection.

Q. I ask you to examine this third photograph, Officer. Please indicate when you've examined it to your satisfaction. A. I've examined it.

Q. Officer, is this photograph a fair and accurate representation of an object you saw in 818 Madison Avenue on December 28th, 1966 in the presence of this defendant? A. Yes, it is.

Mr. Slater: I ask this photograph [8] be received People's 3 in Evidence. I am showing same to counsel for the defendant.

Mr. Green: No objection. I think People's 3 is two exhibits, isn't it?

Q. Now, Officer, I ask you to examine this photograph, please, and indicate when you've examined it to your satisfaction. A. I've examined it.

Q. Is this photograph a fair and accurate representation of an object which you saw in the premises 818 Madison Avenue on December 28th, 1966, when the defendant was present? A. Yes, it is.

Mr. Slater: I ask this photograph be received as People's 4 in Evidence. I am showing same to counsel for the defendant.

Mr. Green: No objection.

Q. I show you this photograph, please, and indicate when you've examined it to your satisfaction. A. I've examined it.

John P. Burns—for Plaintiff—Direct

Q. Is this photograph a fair and accurate [9] representation of an object which you saw in the premises 818 Madison Avenue on December 28th, 1966, in the presence of this defendant? A. Yes, it is.

Mr. Slater: I ask this photograph be received as People's 5 in Evidence, and showing same to counsel.

Mr. Green: No objection.

Q. I ask you to examine this photograph, Officer. Please tell the Court when you've examined it to your satisfaction. A. I've examined it.

Q. Officer, does this photograph represent a fair and accurate representation of an object you saw in the premises 818 Madison Avenue on December 28th, 1966, in the presence of this defendant? A. Yes.

Mr. Slater: I ask this photograph be received as People's 6 in Evidence, showing same to counsel for the defendant.

Mr. Green: No objection.

[10] Q. Officer, I ask you to examine this photograph and tell the Court when you've examined it to your satisfaction. A. I've examined it.

Q. Is this photograph a fair and accurate representation of an object you observed in the premises 818 Madison Avenue on December 28th, 1966, in the presence of this defendant? A. Yes.

Mr. Slater: I ask this photograph be received as People's 7 in Evidence and showing same to counsel for the defendant.

Mr. Green: No objection.

Q. Officer, I ask you to examine this photograph, please, and indicate to the Court when you've examined it to your satisfaction. A. I have.

Q. Is this photograph a fair and accurate representation of an object which you observed in the premises 818 Madison Avenue on December 28th, 1966, in front of this defendant? A. Yes, it is.

[11] Mr. Slater: I ask this photograph be received in evidence as People's 8, and showing same to counsel for the defendant.

Mr. Green: No objection.

Q. Now, Officer, I ask you to examine this photograph, please, and indicate to the Court when you've examined it to your satisfaction. A. I've examined it.

Q. Is this photograph a fair and accurate representation of an object which you observed at 818 Madison Avenue on December 28th, 1966, in the presence of the defendant? A. Yes, it is.

Mr. Slater: I ask this photograph be received as People's 9 in Evidence, and showing same to counsel for the defendant.

Mr. Green: No objection.

Q. Officer, on December 28th, when you were in the premises 818 Madison Avenue, in addition to the defendant and the officer whom you mentioned earlier, were there any other persons in the gallery? [12] A. Yes, there were.

Q. How many other persons? A. There was a member of Bureau of Special Service, a detective whose name I

do not recall. There was a sergeant from the 19th Precinct, Sergeant Cavanaugh, and while we were there one other person came in, an unknown female. That's all I saw.

Q. Officer, how did you gain access to the studio itself? A. The door was open. We just walked in.

Q. Did you ride an elevator or did you go upstairs? A. We entered from the main floor and walked up stairs into the second floor door, which was open.

Q. Was there anything that blocked your entrance in any way? A. No, sir.

Q. Was there any admission charge? A. No, sir.

Mr. Slater: You may inquire.

Cross Examination by Mr. Green:

[13] Q. Officer, I believe you testified that when you stood in the street on the evening of December 27th you saw this flag wrapped like a figure, hanging in the window? A. Yes.

Q. And that was all you did see? A. Yes, sir.

Q. Wasn't the name of the gallery clearly visible? A. Yes, the Stephen Radich Gallery.

Q. There was no mistake, this was the Stephen Radich Gallery? A. No, sir.

Q. Now, how many of these figures that had been introduced in evidence here, eight photos, how many figures were in this exhibit? A. I believe I counted 13. I couldn't be sure, 12 or 13.

Q. Were pictures taken of the others? A. No, sir.

Q. Only of these? A. Yes.

[14] Q. What were the other figures made of? A. I don't know what they were made of, cloth, some cloth.

John P. Burns—for Plaintiff—Cross

Judge Strong: They did not involve the flag, is that it?

A. No, not the flag of the United States Government.

Judge Basel: How many flags did not represent the flag of the United States?

A. The ones we didn't take a picture of.

Judge Basel: How many is that?

A. Seven or eight. Some of them may be duplicates.
Q. There are some that show the same?

Judge Strong: Two that show the same figure.

Q. Now I show you here People's—withdrawn. In looking at these figures, could you tell us which of them actually used the American flag itself and which may have used fabric that looked like the American flag? A. Could you be more specific, sir?
Q. I'll let you look at them, sir.

Mr. Slater: I'll object to the form of the question.
[15] Judge Strong: Objection sustained.

Q. Will you look at those pictures, please, and tell us which of them used actual American flags as you saw them.

Judge Strong: Do you mean flags that were previously made up, pure flags, instead of being made up by the artist?
Mr. Green: That's right, sir.

Mr. Slater: I object to that question. I don't think the witness is qualified.

Judge Strong: If you can tell.

A. I couldn't tell you, your Honor.

Q. You don't know which were flags and which were not flags?

Mr. Slater: I object to the question.

A. Complete flags?

Judge Comerford: Do you understtand these questions, Officer, as put to you by the counsel?

A. Not really.

Judge Comerford: The Court is concerned about these things. Will you be a little more specific?

Mr. Green: I'll be glad to.

Judge Comerford: Things are made out of fabric including the United States flag.

Judge Strong: Anyone could make one.

Q. Could you tell me by looking at these pictures which of them look to you like flags and which of them you felt were actually flags? A. Could I answer one question at a time?

Q. Yes. A. These appear to be flags of the United States Government.

Q. Would you identify them by their number, please? A. No. 9, No. 7, flags or portions thereof of the flag, No. 8, No. 5, No. 4, No. 3, No. 2, No. 1.

Judge Strong: That is all of [17] them, is that right?

A. No, your Honor, there is one that did not appear to be a flag of the United States of America.

Mr. Strong: Which number is that? A. This is No. 6.

Q. But you included that one in your complaint, is that correct? A. Yes.

Q. Is there something in there that looked like the flag? A. It looks like the president of the United States to me.

Q. That is not the flag? A. No.

Q. Do you know how many copies there are actually, how many models of the president of the United States there are? A. No.

Mr. Slater: I object. That is not an issue here.

Mr. Green: I asked if he [18] knew, your Honor.

Judge Strong: The answer is no.

Mr. Green: I think the Court may take judicial notice there is only one emblem of the president, and that is guarded by the Secret Service and carried by them wherever the President is.

Judge Strong: That is not judicial.

Mr. Slater: I agree with counsel. It is, since it's readily ascertainable.

Q. I show you here a magazine, Life Magazine, dated March 31st, 1967. I call your attention specifically to page 18 and 19 of that magazine, and I ask you if the figures represented there is the figure that you saw in the defendant's art gallery?

Mr. Slater: I object to the form of the question, there not being a proper foundation laid.

Judge Strong: Repeat the question, Mr. Reporter.

[19] (Reporter read back the question.)

Judge Strong: Overruled.

A. I see nothing on page 18, your Honor, but on page 19 there is a photo which resembles photo No. 2.

Q. Would you say that is a fair and accurate representation of the figure you identified in Exhibit #2? A. Yes, sir.

Mr. Green: I offer that in evidence, Defendant's Exhibit A.

Mr. Slater: No objection, you Honor.

Judge Strong: Received as Defendant's Exhibit A.

Q. Had you seen that issue of Life Magazine before I presented it to you? A. No, sir. Could I qualify that last answer? I didn't see that picture. I did see the front cover of that book though.

Judge Strong: Proceed.

Q. I call you attention to page 22 of Defendant's Exhibit A, and particularly to the illustration [20] in the lower right-hand corner. Does anything in that picture look to you like the flag of the United States of America?

Mr. Slater: I object to that question since that photograph is not in evidence. We merely received a photograph that was on page 18 and 19, and it would not be proper for this witness to testify.

John P. Burns—for Plaintiff—Cross

Mr. Green: I offer the entire issue of the magazine in evidence, if your Honor please, it bears on our point in this case.

Mr. Slater: I object.

Miss Fingerhood: That there is an improper discrimination as sculptures or paintings which may be hung, but sculptures may not, as the statute reads. I'll get into that later on, but it appears on that point.

Judge Comerford: What connection is that, what you say, and this exhibit?

Mr. Green: What I am saying is we were offering the entire magazine. [21] We claim there is unequal treatment under the law.

Judge Comerford: Don't try the case from there. Tell us what the connection is between what is proper and necessary to put in evidence and the question you're asking the officer. Listen, please. What information are you trying to convey to the Court?

Mr. Green: The statutes specifically refer to an impression of the flag. In the opinion of the onlooker, the statute uses that language. We didn't put it there.

Judge Comerford: What does that have to do with Life Magazine?

Mr. Green: What I am saying is this: I am going to show this Court that there are various uses of the flag, that in prohibiting a use in sculpture there is even unconstitutional prohibition of this defendant to exhibit sculpture, exhibiting a painting or using it in a magazine as an illustration. The statute is not meant to include these.

The [22] statute isn't to protect the statute. Any kind of use for an expression, in other words, there is an exception in the statute.

Judge Strong: Objection overruled.

Mr. Slater: Your Honor, I wish to be heard. The magazine is replete with hearsay. The article was written by someone who was not here in Court.

Mr. Green: I'll limit it to the illustrations in the issue, not the text.

Mr. Slater: I request counsel to separately introduce each photograph in evidence.

Mr. Green: Your Honor, do you want me to do it or refer to the page? I am going to introduce every photograph in this article except the one on page 18.

Judge Comerford: Just one minute, counselor.

Mr. Slater: Your Honor, I stated earlier that the text itself is heresay. [23] The People request that these photographs be introduced, that they be introduced individually, and I wish to state that photographs are a mere substitution of something which cannot for one reason or another be brought into Court, and the proper way to introduce these photographs is to ask the witness whether these photograps are a fair and accurate representation of a) an object or condition which existed at the time in issue.

Judge Strong: These photographs are things that the officer did not see, so how could he say they are a fair representation?

Mr. Slater: Only the first photograph that was introduced into evidence has been testified to was a fair and accurate representation that he saw on

December 28th, 1966. That is why I had no objection.

Judge Strong: That has already been received.

Mr. Green: We are introducing [24] the photographs not as evidence of an objective fact that the witness has seen. We are introducing the photographs. The statute doesn't cover every expression of opinion or thought in its substance written in the statute or that there is unconstitutional descriptions. There are certain forms that are permitted and others are not. Defendant's Exhibit A is a photograph connected with this article, and I could name them all. They could be called A1, 2 and 3, or 3B, treated as one article connected with this photograph except the one on page 18, the only one there, and the one on page 66, the only one there. All the rest are offered as part of our Exhibit A. Now I can enumerate in more specific detail if the Court wishes.

Judge Strong: What does the article state?

Mr. Green: A test case for Old Glory, stuffed sculpture described, abuses of the flag.

Judge Comerford: Are any one of [25] these pictures appearing in Life, what date?

Mr. Green: The date of the issue is March 31st.

Judge Comerford: Which is Defendant's Exhibit A? Are any one of them reproducing a picture of the situation that existed on this man's premises on the complaint?

Judge Strong: Exhibit A does.

Mr. Green: Our point with respect to the other pictures, your Honor, is not to represent the premises of the defendant nor to represent the figures

that he was exhibiting. It is to bring out that this kind of use is a use that exists today in New York and in this country, that this is permitted under the statute expressly, and that the use of sculpture, the use of the flag and these figures are permitted under the flag. In this magazine the use of the flag as sculpture is also permitted under this magazine under the exception that is here for paintings. In other words the statute, your Honor, has an exception. [26] It says this statute does not apply to, among other things, I excluded referring to this issue, not apply to certificates, diplomas, warrants, commission of appointments to officers and now I come to it, an ornamental picture, an article of jewelry, stationery for private use or correspondence or newspaper or periodical printed, painted or placed said flag, colored shield or ensign disconnected or part of any advertisement. It is our contention here there are two points involved here. One is that sculpture was not specified as such as ornamental pictures. It did not mean the legislature meant to exclude sculpture from the statute, just as I think your Honor will note it doesn't say a book, except it says newspapers or periodicals. I don't think anyone would seriously contend you could take these pictures, put them in a book and they would lack the protection of the statute. So with that, what we are saying first, the exception in the statute, although it doesn't mention [27] sculpture, does include it. The other point which these things are pertinent—

Judge Comerford: Counselor, do you wish to take the stand and be a witness?

Mr. Green: I am not testifying.

Judge Comerford: You're doing the equivalent of it and without being sworn.

Mr. Green: I accept.

Judge Basel: The question here is whether sculpture is covered under this statute.

Mr. Green: I respectfully apologize if I did not make myself clear, but what I am saying is there is an exception in the statute for certain things, pictures, and what I am saying—

Judge Basel: And you're saying it should include sculpture?

Mr. Green: Yes. What I want in the record is the fact there is an exception, and if this exception is not uncertainly [28] applied then the statute improperly discriminates.

Judge Basel: That is your argument. What relevance does this have?

Mr. Green: These things are not subject to prosecution, but the same thing, if it's in a round form, is.

Judge Strong: Just because they appear in Life doesn't mean—

Mr. Green: It says newspaper or periodical.

Mr. Slater: Your Honors, may I be heard?

Judge Strong: Your objection is sustained.

Mr. Green: I'll take exception, please.

Q. I believe you mentioned a conversation with the defendant, and in your conversation you said that the defendant told you there was, you talked to the defendant about the price of these works. Exclusively what was said, as well as you remember? [29] A. In view of the fact I didn't see any price tags on them, I asked if they were for sale.

Q. What did he say? A. He said there was no set figure amount for them but the people who would want to pay for them, they would offer something to the artist and he would share.

Q. You asked him if they were for sale and he gave you that answer you gave us? A. I said I asked him if there was a price tag on them and he said there was no specific tag.

Q. Did you ask him if they were for sale? A. He said there was no specific sale.

Q. He didn't answer yes or no, did he? A. No, he didn't say yes or no.

Judge Strong: He did say something about sharing in the profits?

A. Yes, he did, your Honor.

Mr. Green: No further questions.

Mr. Slater: That is the People's case, your Honor.

Mr. Green: May it please [30] the Court at this point, I move to dismiss at the close of the People's case. I most to dismiss first because neither the complaint nor the evidence that has been offered in support of it states any crime. The statute, we will come back to the point we were discussing, with reference to the exhibit, expressly says, "This subdivision shall not apply to any thing permitted by the statute of the United States of America, etc., nor shall it be construed to comply to a certificate, a diploma, a warrant, a commission, an ornamental picture, an article of jewelry, stationery for private use, correspondence or newspaper or periodical or

any of which shall be printed, painted or place said flag, standard, etc." It is our contention, your Honor, that the whole question of constitutionality of the statute does not have to be faced. It's our contention the legislation had in mind when it made an exception for newspapers and periodicals clearly had in mind the first amendment, the right to free speech, [31] the right to criticize, criticize in whatever form they may be doing, and in so doing specifically exhibiting magazines, periodicals, pictures from the damnation, shall be say, and the statute meant to protect, and the legislation had this in mind.

Judge Strong: Don't you think these photographs that have been received in evidence, People's exhibits, they are pictures, would you call them ornamental pictures, which are exhibited?

Mr. Green: Yes, your Honor. Under the statute those pictures could be hung on the wall in a public place and there would be no violation of the statute.

Judge Stronge: Because you call them ornamental pictures?

Mr. Green: Yes, under the statute.

Judge Strong: It's what you mean, ornamental.

Mr. Green: Let's put it more [32] directly. You could take that magazine, hang it on a wall. It appeared on a magazine. The magazine is exempt. What I say on this point, your Honor, as far as this being exempt under the statute, this is the statute, for this doesn't exempt books, it exempts newspapers and periodicals. Now you really don't believe that anyone would argue any book using pictures of a flag or sculptures could be prosecuted under this statute when there is something for newspapers and

periodicals in this statute. What we say on this point, first the legislature meant an exception here for all expressions, whether of opinion or artistic expression, and it put it in, and the statute is artful in many ways, the fact that it omitted specifically to mention sculpture but it mentions an ornamental picture.

Judge Comerford: Counsel, before you proceed any further, so I may not be interrupting your thoughts, did the statute exempt or does it exempt or does the legislature exempt [33] the displaying of a second floor front window in a public street in New York City, the use of the flag in the form of a male sexual organ protruding in the interior portion of the body depicting there the male penis. Does the statute permit that to represent an erected penis in a public place, public street?

Mr. Green: I would say to you—

Judge Comerford: Yes or no?

Mr. Green: You ask a question that is a false exception.

Judge Comerford: These are the facts in the complaint.

Mr. Green: My answer would be yes, that was not the figure that was in the window, and this is not, I might add, your Honor, a prosecution of any obscenity statute. The question is not based on the evidence, if I may respectfully says so, and I would say also that if this were a picture, a photograph, even if it was described by you, [34] the statute would exempt it.

Judge Comerford: I want to know your viewpoint and you have so expressed it.

Motion to Dismiss

Mr. Green: I must emphasize to the Court, to your Honor, there is no prosecution for obscenity. He is not charged with violation of any statute having to do with obscenity. Now, going on, we say then first that on omission of the word sculpture, whether it is excluded in the words ornamental picture or the omission of the word book, where you excluded newspapers and periodicals, is not something that they don't have the protection of the exception under this statute. Going on from there, however, I would say the only exceptions here are for periodicals and exceptions for articles of jewelry, for ornamental pictures, not for sculpture and books. Then I would say the statute denies this defendant the equal protection of the laws and is invalid under the Constitution of the United States and of the New York State Constitution. Classification [35] in statutes have to be reasonable. The legislature may classify certain things, and if its classifications are reasonable, they can be upheld, but it is very difficult to seek any justification to applying this statute to a person who exhibits sculpture, but it doesn't apply to the same man who exhibits paintings, yet if you say the statute does not have an exception for sculpture, that is what you're saying. Now, at the heart of all of this, however, subdivision 16 of 1425 is unconstitutional in that it denies the defendant freedom of speech, freedom of expression under the first amendment to the Constitution of the United States either on its face or to this defendant. The flag as applied is a symbol, so the Courts have held. The United States Supreme Court, in the Barnett case, has held

that the legislature could not compel respect for the flag in the form of a salute, it could not make anybody respect the flag. The case of Whitney against California similarly held in a flag case but that an [36] expression of opinion could not be expressed. Now, whether a painting or sculpture be considered as protest art or abstract art, the creators of sculptures and writers are protected under the First Amendment. The movies are protected to the limit and extent they do not violate an obscenity statute, and we have no obscenity statute prosecution here. We say the use of the flags in these sculptures are a form of expression. The Board of Education against Barnett, which was a salute, the Court said, "It is a primitive way of communicating ideas." Now the Court there held that the statute could not compel anybody to respect the flag by saluting it. The question in the Barnett case, what is the interest which the statute is trying to protect through the flag salute, and then the next question is that interest, one, that constitutionally the statute may protect, and the Court said, compelling respect for the flag, compelling, in other words, good thinking as against bad thinking, or good expression [37] against bad expression, something the statute could not do, and therefore it held, in the flag, in the salute case, it states cannot do this, the defendants could not be punished in any way for the refusal to salute the flag. Now what is the state trying to do here? The state is trying to do exactly that. It's trying to prevent the flag from being treated with disrespect. It's not whether you and I disagree with expression. The issue here is whether

this is First Amendment, symbolic speech under the First Amendment, so what is the state doing here? It's saying you must not hold the flag up to contempt by word or act. What kind of act? The act is the expression of contempt, it's the same as the word. Now the flag is a symbol for the United States. I don't think anybody in this day would argue that an individual couldn't get up and take his government apart or its policies, or government or policies, or the President of the United States or its policies. The flag is the symbol of the [38] government of the United States, and what this statute attempts to do when we say illegally is to prevent the expression of opinion, the expression of thought, and the statute cannot do that under the First Amendment. I would like to make one point. The ban against censorship, the First Amendment, it's not for the expression which is generally acceptable to all of us. What it's protecting is speech we don't like. As the Court said in the Barnett case, "freedom to differ is not limited to things that do not matter much that would be a more shadow of freedom." The test of its substance is the right to differ as to things that touch the heart of the existing order. Similarly, in the Stromberg case again a kind of flag case, there was a California statute that said that you couldn't use a red flag at public gatherings because this expressed contempt for the United States of America and its Constitution. The use by Chief Justice Hughes from our own statute [39] said the State of California can't do that, you can't compel respect for government. If they want to speak against the thing, they do so.

We are not arguing here the question of advertising, use for advertising purposes. This is not an issue here, and I might say the only New York case which held the constitutionality in the Court of Appeals was a case involving the flag for advertising purposes. That is not the purpose here. It was an ad for travel agencies in that case. What we say here is any expression by word, painting or sculpture, any artistic work, whether it is abstract or protest work, obviously things of that nature are something that is protected under the First Amendment and the state cannot prevent. And we say if the Court should say the statute itself is all right, it's constitutional, then we say the statute must be held to be unconstitutional to its application of this particular defendant. This is the proprietor of an art gallery who showed these sculpture because an employee to [40] him asked him to show an art gallery, and that is the only thing the statute wishes to express for contempt, the flag of the United States. We say, furthermore, this section, subdivision 16 of 1425 is unconstitutionally vague, and it is, your Honors, it is a fantastic statute for vagueness. For example, the statute prohibits the defacing, contempt by word or act. This is language which describes attitudes which could be communicated by any kind of conduct, any kind of gesture. For example, thumbing one's nose, would this be contempt, something that is forbidden? Similarly, what is a flag? In here it's defined in the broadest possible terms. According to the statute a flag, any substance, any size, it may purport to be the flag of the United States or simply show the colors, the stars, the stripes of the

flag, or it may be an article by which the persons seeing the same without deliberation may be the same represent the flag. If your Honors, please, this is not effectiveness of what constitutes [41] a crime to anyone. And I would also like to call to your Honors' attention subdivision d here, which is one of the subdivisions which this defendant is charged with violating, is not of an object. It says, if you begin up at the beginning of subdivision 16, it begins: "Any person who," and then there is a whole group of subdivisions, each one of which is a complete cause, a subject, a verb, an object, except subdivision d, which says: "shall publicly deface, defile, trample upon or cause contempt upon either by word or act or it has no object." Other subdivisions in this section have an object. This has none. That is certainly vague. But further on this question of vagueness, how could you defy the United States flag, what does that mean? This could mean anything, anything to any person. It may be various things. I might say that to me personally the idea of an exception in this statute for articles of jewelry were commercial, is showing itself not on the basic issue. [42] It shouldn't be done.

I don't believe it should be prohibited, but the idea giving an exception, the works of jewelry, this is in the class of advertising. Now, this Court, the statute, let me say this, must be specific. It must tell what it's going to do. In Cox against Louisiana, the United States Supreme Court, you had a statute which had a perfectly valid purpose. Its purpose was to prevent the obstructions of the public's passage in the streets, but the statute gave no standard for determining how it would be applied, and the U.S. Supreme

Court held that statute was invalid because no standards were set. For determining what was wrong, what is a representation of the flag here, what is a representation of the flag by way of illustration, that statute could not stand up. Similarly, there was a case that came out of Pennsylvania, the Giacci case, 382 U.S. 399. In that case there was a Pennsylvania statute. There were no standards in the statute. Now the state contended, [43] through the Court term tapes, the defendant's conduct had to be reprehensible, improper, outrageous to immorality, before the Courts could be assisted. The Supreme Court held that was constitutionally invalid as written, and because the absence of the sufficient standards to guide the jury.

Judge Basel: I ask you a question. Is it your argument that if these same figures were in a painting and not what is referred to as a piece of sculpture, then the statute would protect it?

Mr. Green: Yes, your Honor, the statute says that expressly. I could also—

Judge Basel: And in the ornamental opinion?

Mr. Green: Yes, exactly.

Judge Basel: Then the only question in this case, as far as you're concerned, is that does this exclude from the statute because it's sculpture, painting and not an emblem?

[44] Mr. Green: That is not the other question. That is an outside question. That is the question that avoids all the constitutional questions.

Judge Strong: It's also if there is actually a contempt.

Mr. Green: That is a question of fact for the Court.

Judge Comerford: For the benefit of the Court, define the meaning today as used as a term, the word "sculpture."

Mr. Green: I will, your Honor: I didn't mean to be testifying. We will put that in evidence. Sculpture today includes any three-dimensional objects, and it has for the last 50 years been made of any kind of material. Sculptors work in fabric, plastic. They work with pieces of used junk that they take out of the used junk, regardless, steel, auto mufflers. In the Whitney Museum today, and the Court could take judicial notice of this, there is a work, Louise Nevelson, a famous [45] contemporary sculptor, who is not exactly a young lady, and her work covers a long period of time. She is a typical illustration of the sculpture today, using materials of all kinds. She puts pieces of wood, fabric on things, she combines all these things. This is something that has grown up in the last 50 years. Again, your Honor, I don't mean to be testifying. I am trying to answer your question.

Judge Basel: I asked this question, how do you get away from applying what is the statute which says you can't show contempt for the flag, assuming sculpture is covered under the statute?

Mr. Green: Let me say this, your Honor, if these exceptions don't apply to contempt, to the employee, then you have a First Amendment question. The way the statute is written, at the end of all the things that can't be done it says: "This subdivision shall not apply to," and then it goes on and it says: "ornamental pictures, articles of jewelry, [46] stationery for use and private correspondence, news-

papers or periodicals on any of which some are printed the sheld or ensign connected or part of any advertisement." In other words, there is an exception here very clearly in the statute for anything not connected with—

Judge Basel: Your argument is the First Amendment will cover contempt for any form of expression as specified in the statute?

Mr. Green: That's right, and the statute had in mind when this was made, so we don't therefore have to get to the First Amendment question.

Judge Strong: This paragraph that sets out the exception, it makes no difference what form that piece of jewelry may be? It might be in the same form as these sculptures?

Mr. Green: That is the way the statute is written.

Judge Strong: Even if it was held to be contemptuous?

[47] Mr. Green: Yes, as far as I can see the only reason for these exceptions in the statute is that the legislature, and there is no legislature history on this, which is true of most of our New York State, but it had in mind it could not interfere with freedom of speech.

Judge Strong: I think what they had in mind was nothing. That is what upheld, in the form of a flag, that kind of jewelry, not jewelry in the form of sculpture such as we have here.

Mr. Green: I was going to say newspapers or periodicals, for example, there is an exception for them, and traditionally newspapers have used the flag in obscene ways.

Judge Strong: You mean cartoons?

Mr. Green: Yes, newspaper cartoons. This is a traditional thing, in color or out of color, and sometimes Uncle [48] Sam, with the American flag, is shown as a pretty miserable fellow, this, I believe, from history books that are from the New York City school system, where I received my education. In the days when some of the papers in the banana republics, they used to do it, Uncle Sam carrying the flag and doing things that were wrong. In other words, I think the legislature had in mind that it was getting out of this First Amendment area, it was protecting expressions of opinion, and you void the whole constitutional amendment for their ornamental picture. They didn't mention sculpture. They put in newspapers or periodicals but they didn't mention books. I don't think anyone would prosecute it.

Judge Strong: Do you have further argument?

Mr. Green: Yes, your Honor. On this question of vagueness we have a recent case in the New York Court of Appeals, People against Bookcase, Inc. That was a case where [49] there was a section of the Penal Law that the Court of Appeals invalidated.

Judge Strong: We are familiar with that case.

Mr. Green: If your Honors, then what the Court said I would like to quote one phrase which is not in my brief, that is, the constitutionality, the publication should be tested by what can be done under it and not by the particular violation which is charged with having occurred. And I think it's very clear what can be done under the statute is if you're going to take it literally, not cover us with that exception, the statute could prosecute an expression of opinion.

It could prosecute speech, whether symbolic speech through a flag or actual, because it says "by word or act," and we say that this fails to meet the test of the Bookmaster case in the terms of necessary clarity and deafness, and on these grounds, your Honor, I move for a dismissal at the close of the People's case.

[50] Mr. Slater: I wish to state first for the record, a hearing was held earlier in this case on February 10th before the Honorable Judge Silver. This case was held for trial on this date. Now, your Honors, the statute has previously held constitutional in the case of People v. Van De Carr, which is a 1904 case. At this time the Court said it was within the police power of the legislature to enact a statute to further the preservation of the peace.

Judge Strong: Is that the case defense counsel referred to, advertising?

Mr. Green: That is not the case I referred to. It did not imply it was constitutional. It implied it was unconstitutional.

Mr. Slater: It held, it applied to certain facts in the case as unconstitutional not on the grounds it was a denial of free speech, but here were certain objects made prior to the enactment of the statute, and [51] the Court said this, in fact, this was an ex post facto regarding this particular defendant in this case, and therefore the statute was unconstitutional to him because it was a denial of due process. As to the statute being constitutional applying to freedom of speech, it held the constitutionality. It says it was within the police power to pass such a law. Now two years later in the Supreme Court, in

the case of Haltena v. Nebraska, in that case there had been occasion to review a similar statute which was enacted in Nebraska. At that time the Court said it is within the power of each of the states to pass such legislation as long as it doesn't contravene federal legislation. Now the only federal legislation that exists in the area regarding the U.S. flag for these purposes which provides any person who, within the District of Columbia, shall publicly mutilate, trample upon or cause contempt either by word or being standard colors or ensigns, shall be deemed guilty as a misdemeanor. This [52] applies solely for the District of Columbia. Therefore, the states are free to enact this type of legislation. As your Honors know, the Penal Law is supposed to be strictly construed. There is no exception here for sculpture. People contend that there are certain objects and conduct which will arouse the wrath of the people and possibly cause violence. These objects might be a flag, as we know it, the fabric or a sculpture as counsel contends this is, and upon seeing the flag dishonored as we, People, contend it has been, the people who view this may be aroused to violenee. And this is what the legislation seeks to prevent and has enacted this statute as part of the police power of the state. The People ask what the defendant's expressing in these objects which he has called sculpture. Now whether a person can be compelled to salute the flag or to give any positive form of respect towards the flag is not an issue here. What is an issue is it's in the power of the legislation. The statute [53] is not vague. Counsel for the defendant said it's vague. Now on to the case of State v.

Schlueter. This was a New Jersey case. The statute penalizes any person who publicly mutilated, trampled upon or otherwise defaced any flag of the United States. The Court said the word "deface" is used in the meaning of dishonor, which is the equivalent of acquiescent callousness. The flag is an emblem of authority and the power prohibits its use and the power to prevent its defilement is certainly within the power itself. If we were to allow individuals to show great disrespect to the flag, the People contend that the public would be aroused to the point where there would be possible riot and strike. Now the Court knows, I am sure, rather the right of free speech as given to us in the Constitution, and that is a license to say what we want to and wish. In the Schends case, as your Honor knows, Chief Justice Holmes said that the power of free speech does not protect a man from crying [54] "fire" in the movie theatre or any theatre when, in fact, there is no such fire. There is a certain amount of restriction on the power of free speech for the overall benefit of every one. In this we contend the statute was intended for the benefit of society as a whole.

Judge Strong: We have here paintings of similar objects instead of three dimensional sculpture.

Mr. Slater: I would say then the legislature took into consideration what objects would arouse the public wrath.

Judge Strong: Three dimensional objects might and pictures might not?

Mr. Slater: Yes.

Judge Strong: Even though they are pictures of the same objects?

Mr. Slater: That's right. Well, for one thing, a photograph in a book is not an animated object and cannot be touched.

Judge Strong: Scultpure is animated?

[55] Mr. Slater: It can be touched, it can be seen, and it is an object more likely to arouse the public wrath. I think this is what the legislature had in mind. It appears the legislature took into consideration which would arouse the public wrath and did not include them in the objects which would be excluded.

Judge Basel: Are you familiar with collage painting?

Mr. Slater: No.

Judge Basel: Where you take forms and pieces and paste them upon a frame and then paint around it. Do you think that would be excluded from the statute or included in the statute?

Mr. Slater: My opinion is strictly a personal one.

Judge Basel: Based on a painting which is a very important form of art today, and then you took oil paint and painted around it, would that be in or out of the statute?

[56] Mr. Slater: I think that would be excluded by the statute since basically that is a painting, but here we do not have a painting.

Judge Basel: You get down to a very definite point of what is excluded and what is not included. I don't think your argument holds water, just because you could touch something it's excluded from the statute.

Mr. Slater: My argument is, your Honors, the legislature had the power to enact this legislation

within its power, police power. The legislature had in mind that the Constitution gives our citizens, those who reside within our quarters, the right of free speech, and any abridgement must be zealously and carefully watched.

Judge Basel: What about the question of this work being contemptuous? Do you say if it was a painting and could be touched you would say the statute does not cover?

[57] Mr. Slater: Yes, I would, because the statute apparently excludes it and you know the Penal Law must be strictly construed.

Judge Comerford: We are specific in the abstract and psysiological reasons here.

Mr. Slater: Yes.

Judge Comerford: We have some of these exhibits, namely, the exhibit on this trial. Do you wish to make any issue of any one of these?

Mr. Slater: Well, your Honors, I have seen the photographs. People contend these photographs represent a mutilation of the flag. This is why this case is before us. There is a mutilation, a dishonor of the flag, and this is in violation of Section 1425 of the Penal Law.

Judge Basel: What you're saying, this flag was mutilated. What I understand, if it was in the form of a painting, then it would not be guilty, is that right?

[58] Mr. Slater: Yes, your Honor.

Judge Basel: So what you're saying, it's broad because it's mutilated in the form of sculpture?

Mr. Slater: What I'm saying, the Penal Law must be construed. The statute does not say or apply to

paintings; the statute had in mind we cannot abridge the power of free speech without some justification. It's a very limited power. Now assuming these objects are an expression of thought of the artist and those who display it, the People contend here to the power of free speech is abridged, and one cannot by word or act arouse the public to such a state that they will cause a riot and strike. Now, in New York State we had the case some years ago back in 1951, the case of Feiner v. The People of the State of New York, where your Honors are familiar with this case. The defendant was in the City of Syracuse and speaking on a street corner and he was talking about the President of the United States and various [59] government officials, including the mayor of the city, and he spoke at great length about the treatment of Negroes, and it was quite critical. There was a large crowd which assembled and grew larger and larger as the defendant spoke. The police, on three occasions, asked him to move on, and on the last occasion to cease speaking entirely, but not as the Court found, not that they started to abridge his right of free speech, but the defendant was creating a condition wherein there might be possibly a riot started at any moment. The Court recognized that there is a certain abridgement of free speech allowed by legislation. In this particular case it was 722 of the Penal Law.

Judge Strong: That concludes your argument?

Mr. Slater: Yes.

Judge Strong: Do you have anything to add?

Mr. Green: Yes, just two [60] things. In the Van De Carr case, which has been referred to by the

District Attorney, is authority for nothing except what was held in the case, namely, that is applied to that defendant of the statute was unconstitutional. Everything else in 1904 is the same. It seems to me the District Attorney's argument in justification and support of this statute is that the state had the power to make this criminal conduct as to a sculpture but not a painting on the theory it was preventing violence. On that I want to say two things. There is not an iota of testimony or anything in the complaint that indicates any threat of any kind of violence by anybody in the premises or outside the premises, so that I would say, as a matter of law, if the thing could be justified on such a basis, the People have failed to produce any evidence of it. Now furthermore, however, on this basis—

Judge Strong: I think that is a conclusion the Court has to draw whether [61] that was the circumstances. I don't think the People have to prove the possibility of the tendency to create a disturbance.

Mr. Green: The Courts have gone further. The Courts have held there must be evidence there has been a—

Mr. Slater: Your Honor—

Mr. Green: Going beyond that, I would say that this business of whether speech may cause violence is a very, very limited justification for a restraint on speech. The Terminiello v. Chicago case, there Terminiello, the defendant was engaging in the most offensive kind of denunciation of Jews, Negroes, of minority groups, and he was arrested on a charge of this kind of thing, and it was in the record, your

Honor, that there was an unruly crowd forming outside, and the Supreme Court said the right of speech is a right that applies to nasty speech, to speech we don't like, to unpopular speech, and it was the duty of the police to prevent the right thing, not to prevent [62] this defendant, Terminiello, from speaking. First of all, in summing up, there is no evidence whatsoever of any threat of violence.

Judge Strong: There is no proof of any crowd collecting?

Mr. Green: No evidence of any kind. In addition to that, your Honor, the testimony to make a distinction between a sculpture is something that could cause violence but not a painting or a book but not a magazine which is involved here, I think is a very thin and nebulous one. This has been extremely limited by the Supreme Court.

Mr. Slater: May I be heard? We must look to the potential of violence, your Honor, not whether there was actual violence. Now, the People contend regarding this particular case there was no need to show violence. We must show there was a defilement or dishonor of the flag, as I said before. As I said before, this Van De Carr case is the only case regarding the constitutionality in New York [63] State, and I said earlier it was ruled unconstitutional regarding these particular defendants because the statute is looked upon, he is ex post facto applied to them, but the highest court felt that this statute was constitutional. Now, where the case that went before the Appellate Division, the decision was as follows: I wish to quote for the Court: "It was

competent to the legislature to make it a misdemeanor to publicly mutilate, defile, deface, trample on or cause contempt either by word or act upon the nation or state flag, and mutilation of the flag may mean the printing of advertisement on the ensign itself. Such legislation is within the police power itself for it relates to the preservation of the peace. It tends to prevent the commission of acts which would arouse the public which would lead to chastisement, or it's not a mere oratorical phrase to say the guardians and protectors of the flag. The state has taken upon itself the punishment whose action would incite the peace, and [64] legislation to accomplish that relates directly to the preservation of the public peace and the good order of society." And I quote the citations: People v. Van De Carr, 1904.

Judge Strong: The Court will take a short recess.

(Court takes a short recess.)

Judge Strong: We do find a prima facie case has been established, and your motion to dismiss at the end of the People's case is denied. Do you want to step up?

Mr. Green: I would like to note my exception for the record. I will call the defendant, Mr. Radich.

Court Officer: Step up. Face the Judge. Raise your right hand.

Judge Basel: Do you swear the testimony you will give in this case to be the truth, the whole truth and nothing but the truth, so help you God?

Mr. Radich: Yes, I do.

Stephen Radich—for Defendant—Direct

STEPHEN RADICH, having [65] first been duly sworn, testified as follows:

Court Officer: In a loud, clear voice, give your name and address.

A. Stephen Radich, 818 Madison Avenue, New York.

Court Officer: Your business or occupation.

A. I own a gallery, an art gallery.

Judge Comerford: Are you a sculptor?

A. No, sir, I am not.

Direct Examination by Mr. Green:

Q. Mr. Radich, if I may take his honest question, you're not the artist who did the works which are represented in the People's various Exhibits 1 through 9, are you? A. No, I'm not.

Q. Are you the proprietor of an art gallery at that address, is that right? A. Yes, I own the gallery.

Q. How long have you had the gallery, Mr. Radich? [66] A. A little over seven years.

Q. What other things do you exhibit in that are gallery and have you exhibited during the course of the time? A. I show sculpture primarily, but I also have paintings and drawings and other art objects.

Q. And before that, what was your experience in the art gallery business? A. I've been in the business roughly 14 years, having worked with the Court Valentine Gallery, the Martha Jackson Gallery and the Wier Gallery.

Q. Prior to that, did you have any education in the field of art? A. Yes. I have a degree in Fine Arts at Columbia University.

Q. In getting your degree, did you specialize in any particular field of art? A. Primarily in contemporary art, history of art, but there was an emphasis on contemporary art.

Q. By the way, do you mean by contemporary, what century? A. 19th and especially 20th century art.

[67] Q. Now, let me ask you this; you're familiar with the art, with the field of contemporary art, 19th and 20th century art; could you tell us something about the use of materials in art, 19th and 20th century art, particularly 20th century art? A. The works of art that have been produced within the last 50 years have varied considerably. Painting, just using oil paint or other kinds of paints, such as tempera, or sculpture using stone or bronze, is not any longer primary materials that artists use. Artists now use a various variety of materials in their work. The sculptors use wood, they use junk, they use cloth, they use glass, plastics and many materials that are coming into being through the advance of technology and products of new substances. The artists are finding these things valuable and are using it in their works of art.

Q. Now, there was a question raised before by one of the judges having to do with collage. What are the uses of materials on those? A. Artists have used scraps of paper, fabric, plastic, chips of wood, and they have glued these together on wood, on canvas. There have been many objects.

[68] Q. So collages, even though they are hung in a frame, involve three dimensional? A. Yes.

Q. Now, turning to the works that were displayed in your gallery, when the police officer testified he was there on December 28th, how many works of three dimensional art were there in that show? A. There were roughly 13.

Q. They were all done by one artist, Marc Morrel? A. Marc Morrel had a one man show, and all of his work was displayed in about two-thirds of the gallery.

Q. And before that, could you tell us when that show ran in your gallery? A. It opened on the 13th of December and ran through, I think it was the 7th of January. Those were the dates of the shows. It was extended approximately two weeks.

Q. Did you send out any notices to any mailing list or persons about this exhibit? A. Yes, a brochure was sent out for this exhibition, as done with all other shows I have.

[69] Q. I show you this piece of paper and ask you if you can identify it? A. Yes. This is the brochure that was sent out for the Morrel exhibition.

Q. And to whom did you send that out? A. I have a mailing list that includes some fifteen to eighteen hundred names, and that is collectors, museum people, etc., the press, and universities, art departments.

Mr. Green: I offer this in evidence as Defendant's Exhibit B.

Mr. Slater: No objection.

(So marked by reporter.)

Q. Was that the circular that was available in the gallery during the time the works were on exhibit? A. Yes. I always had a dozen or so available for people who come to the gallery that want to know the artist's name or want a souvenir.

Q. Now, did you mention there were 13 of these three dimensional figures? Were there any other works of that artist, Morrel, at the gallery at this time? [70] A. Yes, three framed watercolors depicting works that were in the exhibition or works that the artist had in mind that he may not have yet made or constructed.

Q. Well, will you tell us which of the works or which works in the exhibit, the three dimensional works, was depicted in a watercolor that was hung on the wall? A. The sculpture that was hanging in the window was also depicted as a watercolor and was framed hanging on the walls.

Judge Strong: That is the one that involved the noose?

A. Yes, your Honor.

Q. Did either of the other two watercolor paintings, did they make any use of an American flag or an American flag motif? A. Yes. The other two also had an American flag motif in the workings.

Q. And they were framed and hanging on the wall with the watercolor of the hanging figure? A. Yes, they were.

Judge Basel: Has Morrel [71] exhibited in New York before?

A. Yes, he has, your Honor, in group exhibits, but this was his first one-man show.

Judge Basel: What is his background as an artist?

A. He has been in New York roughly eight or ten years, I suppose. I first saw his work about four or five years

ago. He was then primarily involved in painting, and I saw his work in group exhibits, and he then had the one-man show in my gallery.

Judge Basel: Has he studied painting or sculpture with anybody?

A. I am not certain about his education.

Q. His works have been exhibited in other galleries in group exhibits? A. Yes, they have been.

Q. Now, during the exhibit of these works of Morrel's in your gallery, was there any musical background played? A. We had a tape recorder with protest songs playing during the show.

Q. What were these songs protesting? [72] A. Primarily, they were war protest songs.

Q. Now, in terms of Morrel's work, were these works for sale? A. Yes, they were all for sale.

Q. Did you ever tell the police officer, as I believe he testified, that there was no price on them? A. No, I did not. I told him that all the works were for sale.

Q. And did you have prices on them? A. There was a price list available if anyone asked for it, yes.

Judge Strong: What was the price range?

A. The constructions were priced from 250 to $1,200.

Q. Now, in terms of your familiarity with the history of art, have you ever encountered the term, "protest art"? A. Yes, I have, certainly.

Q. And would you describe protest art to the court? A. Well, there have been many forms of protest art. For example, Michelangelo, we could say, protested [73] against

the church when he painted one of the cardinals who was a future Pope Paul the Third in a position which he considered Hell because he was upset by the actions and the behavior of the ecclesiastics. There was a great artist, the 18th century Goya in Spain, who did many protest pieces. The famous thing was the disaster of war. He also protested against the corruption of the Spanish court, and did a famous series, which was called Capriccios and Eudonia [sic Daumier], in the 19th century, protested in his art of the misuse of justice and depicted lawyers and judges and also depicted politicians in his cartoons. Recently, Pablo Picasso did the Guernica, which is in the Museum of Modern Art, and this was a very violent and brilliant work of protest. This occurred during the Spanish Civil War. There are many others like this.

Q. In terms of the 20th century and more recent times, could you think of any artist that protested against Nazism or Germany?

Mr. Slater: I object to that. I fail to see the need of going into this any further.

[74] Judge Strong: I think we're going somewhat far afield.

Q. Now, turning to the work that you were exhibiting, the work of Mr. Morrel, the artist, did you consider those works as works of art? A. Yes, I considered them works of art.

Q. Did you consider them to be protest art?

Mr. Slater: I object, leading the witness.

Mr. Green: I withdraw the question.

Q. What type of art did you consider them to be? A. They were protest art, by and large.

Q. Could I have the People's exhibit, please? What do you, as the operator of an art gallery and one with a background in art history and contemporary art, what protest did you consider them to be making? A. Well, I felt there were many protests. There were protests of the war in Viet Nam or war in general, destruction, protest against certain societies, and justice in this country, protest against the infringement [75] of the people's rights to use freedom of speech.

Q. Did you consider, in exhibiting these works, you were being contemptuous to the flag of the United States? A. No, I did not.

Q. Did you have any idea or did you think Mr. Morrel, the artist, was being contemptuous to the flag of the United States?

Mr. Slater: I object.

Judge Strong: Sustained.

Mr. Green: Your Honor, on that again, getting down to the business of the opinion which is in the statute, that is the only reason I raise the question.

Judge Strong: I don't think the witness is in a position to testify for what Mr. Morrel had in his mind.

Q. Did you have any intent then to express yourself in contempt for the flag by exhibiting these sculptures? A. No, I didn't.

Mr. Slater: I object.

[76] Judge Strong: Overruled.

Q. Now, as an art gallery operator, when you exhibited paintings or sculptures you testified they were for sale,

and what is your business arrangement, what was your business arrangement with Mr. Morrel? A. My business with Mr. Morrel, as well as all the other artists, and this is generally the practice by most galleries, the works are consigned by the artist to the gallery, the gallery sells the work, and the gallery receives a commission of one-third or three and a third percent.

Q. And that was your arrangement with Mr. Morrel? A. Yes.

Q. Have any of these works been sold by you? A. One of the sculptures was sold.

Q. And you received your commission on that? A. Yes.

Judge Strong: Private purchase?

A. Yes, private collector.

Mr. Green: Could I have the [77] Defendant's Exhibit A?

Q. I show you here a copy of Life Magazine, the publication dated March 31st, 1967, and I direct your attention to page 22 of that issues of the magazine. Does any photographic reproduction on that page represent a true picture of a work of any kind that you have seen yourself? A. Yes, I am familiar with these works.

Q. Which are you familiar with, all the works on that page? A. I've seen two of them, the actual pieces, and one I've seen reproduced, and now that it was in an exhibition in the Museum of Modern Art.

Q. Which one is that? A. That is the figure here, here on the left, by a Japanese artist by the name of Kojimi.

Q. And which of the works have you, yourself, seen? A. I've seen this painting by Wesselmann, and I've seen—

Q. That is the one on the right? A. Yes, and the one up above by Jasper Johns.

[78] Mr. Green: I offer this page 22 of Life Magazine in Evidence as Defendant's Exhibit, the photographs, Exhibit C.

Mr. Slater: Your Honors, I object to the introduction of these photographs, one on the grounds that all three are irrelevant to the case at hand. As to the one which is in the lower left-hand corner, the defendant has himself testified that he is not personally familiar with this work of art, that he has not seen it for himself.

Judge Strong: We don't see the relevancy in this particular case.

Mr. Green: Well, if you Honor, please, the relevancy, I believe, is that these once again demonstrate and they go to the one, the basic issue in the case, that if, in fact, there is no exception, either there is an exception for these works and that includes sculpture and these things, and not for these which are the samples that are exempt and not the sculptures, then the statute discriminates [79] unfairly as an exhibitor of sculpture.

Judge Strong: The mere fact that they appear to be reproduced in Life Magazine, that doesn't mean they are exempt from the statute.

Mr. Green: Your Honor, the statute expressly says ornamental pictures are exempt, newspapers and periodicals; and the witness has testified that he has seen the originals of the things reproduced there, and he has seen them and I would from there go on and show where he has seen them.

Judge Strong: That still doesn't prove they are exempt from the statute.

Mr. Green: Your Honor, we are offering them in evidence to the kind of things that are exempt from the statute. We would like the record to show that these things are exempt from the statute and there is discrimination.

Judge Strong: That is your argument.

[80] Mr. Green: Yes. Then the purpose of having them in there is to have them in there in case your Honor decides against this.

Mr. Slater: There is no judicial authority from the statute.

Mr. Green: We feel the Court, in order to make a determination whether the works that are involved in this exhibition of the defendant, it is necessary for the Court to know the kind of works that are exhibited, and that may or may not be exempt from the statute. The Court may say none of them are exempt. In order for the Court to have a picture what is involved in the world of art today so this defendant has his case fully presented, we feel these are essential.

Judge Basel: We have no collateral knowledge to know if this was prosecuted or not.

Mr. Slater: The counsel wants to bring into evidence items that were [81] not on display by this defendant. These are not the subject at hand.

Mr. Green: They are the subject of the case at hand. It's on the question of the whole business of what is art today. If the state, if the legislature has no power to prevent expression by words, by painting, by symbols, by any form of art expression, then

these are pertinent to the case because in this way we have before the Court the articles, the kind of articles, the kind of works that are considered works of art today, and they go also to the question that has been raised by this Court about whether something contemptuous in terms of morals. This word "contemptuous" is a very vague word to hold the flag in contempt. In other words, one, the morals of our day in terms of what may be done, what may not be done, this is true in various types of speech, something like the moves of Ulysses. It was true in the bookcase of Ulysses, what is appropriate in language or any form of expression [82] varies with the morals of the time.

Judge Comerford: Counselor, your client, this defendant, is not being charged with possession of these items that we are exhibiting. We have a specific issue before the Court. We have the People's exhibit here and we have the defendant's exhibits.

Mr. Green: That's right, your Honor, but he is charged—

Judge Comerford: That is sufficient for this trial. We are not trying out an investigation. We are not here to investigate anybody. We are a court to find out what crime was committed and—

Mr. Green: The defendant is charged with violating one of two subdivisions, f and d. D does not charge anything publicly mutilate or pass contempt, but subdivision f, which is the other one, he is being charged for doing something that is the charge of publicly carrying or displaying any emblem, placket or flag which causes contempt upon the [83] flag of the United States of America, but that is what it says. Now, what we say is that the phrase, cause

contempt upon, and that is what he is charged with doing here, displaying something that caused contempt on. This is extremely subjective terms, one way we can determine something the legislation is valid and not void for having necessary one way. We can determine whether he is causing contempt to the flag is apart from his own attempt is what is being done in societies in our world today calmly and gently, not whether other people are committing crimes.

Judge Comerford: We are concerned about what the defendant did at this time and place.

Mr. Green: That is exactly correct. Whether speech is right or wrong, whether expression is right or wrong is dependent upon the trial.

Mr. Slater: People contend this collateral matter should not be received.

[84] Judge Strong: For that purpose the counsel has outlined we will receive them.

Mr. Green: Thank you.

Judge Comerford: For the purpose of making contrasts and comparisons, subject later on to evaluation.

Mr. Green: I understand the Court will evaluate all the evidence. I have no question about that.

Q. There is a reproduction there, Mr. Radich, of a work by an artist by the name of Wesselmann, I believe, in the lower right-hand corner of that page. I have another copy of it. If it will help the Court, I could let the witness look at this. Am I correct that it was your testimony that you had actually seen that work? A. Yes.

Q. Is that all painted or are there fabrics on it or other

materials? A. It's partly collage and partly painted, as I recall.

Q. Do you know if the flag is painted on it [85] or is it a large flag that is pasted on it? A. I think the flag was real. There was other fabrics, there was paint and actual reproduction of a painting, as I remember the picture.

Mr. Green: I have no further questions. Your witness.

Cross-Examination by Mr. Slater:

Q. Mr. Radich, are you the sole owner of the gallery? A. Yes, I am the sole owner.

Q. When did you first acquire this gallery? A. It was about 1960.

Q. When did you acquire these objects which were exhibited? A. The Morrel objects?

Q. Yes. A. They were delivered to the gallery a few days before the exhibition was open.

Q. During the time of the exhibition, specifically on the case in question, December 27th and December 28th, was this gallery open to the public? [86] A. Yes, it's always open to the public.

Q. Is there any admission charge? A. No.

Q. Any persons excluded from that gallery? A. Everyone was free to walk in.

Q. What was the arrangement that you had specifically with Morrel as to the commission that you would receive? A. My arrangement with Morrell, as with every other artist, I receive a commission for the works that are sold.

Q. Well, specifically, what were you to receive from Morrell? A. If the work of art was sold, the amount of money received was to be divided. He was to receive two-thirds of the amount and I, one-third.

Q. And you sold one object, you said? A. Yes.

Q. How much was this object sold for? A. I believe it was $900.

Q. And did you receive about $300? A. Yes.

[87] Q. Mr. Radich, I am going to ask you to examine People's 3 and People's 4 in Evidence. These are photographs of one particular sculpture, is that correct? A. Yes.

Q. Depicted here is a cross, is that correct? A. Yes.

Q. Now, there are several flags involved, aren't there? A. Yes, there are.

Q. Could you tell the Court which flags are involved and where they are situated on the cross?

Mr. Green: I object to that. I think the representation speaks for itself.

Mr. Slater: There has been an objection, and I contend, since these are supposedly works of art, counsel for the defendant has stated that the defendant should probably state exactly what the composition parts are and the work of art.

Judge Strong: Which are you referring to now?

[88] Mr. Slater: People's 3 and 4.

Judge Strong: You mean what it is made of, up of?

Mr. Slater: Yes.

Judge Strong: What is your question?

Mr. Green: Read back the question.

(Reporter read back the question.)

Mr. Green: My objection is it speaks for itself.

Mr. Strong: I think the question is not quite clear. I think it's objectionable. Overruled. I think you should rephrase it.

Stephen Radich—for Defendant—Cross

Q. Specifically, is the American flag involved; is there a portion of the American flag connected with this exhibit or made part of the exhibit?

Mr. Green: Again I object on the exhibit. It clearly speaks for itself. The Court is—

[89] Judge Strong: Overruled. You may answer it.

A. Yes, there is a part of the American flag used in this construction.

Q. Was the American flag depicted as in this exhibit?

Mr. Green: I renew my objection.

Mr. Slater: Your Honor, counsel for the defendant has stated these objects are a form of protest, a form of speech, and I wish to find out exactly what the American flag is supposed to be saying in these various exhibits.

Mr. Green: If counsel wants the witness to testify as to what this sculpture's protest is, I think that is a perfectly proper question. He should ask it instead of name by name. What the Court could see, I have no objection to that question.

Mr. Slater: I intend to ask that question.

[90] Judge Strong: You allowed a great deal of limit in your direct, so I think the People should be allowed also. Proceed.

Mr. Slater: Would you read back the question?

Q. What is that supposed to be doing? A. Well, it seems to represent a penis.

Judge Comerford: A human penis?

A. Yes, your Honor, it would suggest that.

Q. Now, there are tassels about the American flag at the base of this cross as it appears. Could you tell the Court what these tassels represent? A. It is probably a decorative or pubic hair, depending on what one decides it looks like to him.

Q. As to the main body of the cross, that is the vertical piece, what flag is involved? A. That is the Panama flag, I believe.

Q. Now, as you face, as you're looking at People's Exhibit 3, what flag is involved on the left crosspiece, the horizontal piece? A. I'm not positive, but I think it's the Episcopal flag or Christian flag.

[91] Q. On the right crosspiece what flag is depicted there? A. I think that is a Christian flag, but I am not sure which.

Q. Please tell the Court what this object was expressing or protesting. A. Well, in my opinion, I believe that this work is a statement by the artist which he is showing or trying to depict that there is not a separation of church and state, that the government of this country is involved in aggressive acts of war. Perhaps the penis represents the sexual act by which substandards is considered an aggressive act. The figure represents a cross. Religion, organized religion on the symbol here, and it seems to suggest that organized religion is supporting these aggressive acts that are being made. It also suggests that this is also a puppet, that the church or organized religions are either supporting or leading these actions of aggression or they are being led by it. That is my interpretation.

Q. What was this object selling for? A. This was priced at $1,200 during the exhibition.

[92] Q. Did you sell this? A. This piece was not sold.

Mr. Slater: I have no further questions.

Judge Strong: You may step down.

Mr. Green: Excuse me. I would like to ask another question.

Redirect Examination by Mr. Green:

Q. In connection with the People's Exhibits 3 and 4, which I believe you have been asked about, this particular work, this particular construction as protest, was it your opinion that the artist was expressing contempt for the flag or contempt for people who were using the flag as an aggressive weapon?

Mr. Slater: I object, your Honor.

Judge Basel: Please read back the question.

(The reporter read back the question.)

[93] Judge Strong: You're asking for his own view or what the artist had in mind?

Mr. Green: Yes, his own view, because he is the defendant in this case.

Judge Strong: Overruled on that understanding.

A. In my view, I think the artist was not being disrespectful to the flag. In fact, he was questioning the behavior of the organizers, the government, whatever is involved here, that are involved in the acts that are being performed and supported.

Q. By the acts that are performed and being supported, what action are you referring to; what action did these—

A. Aggressive action of war, and they are being supported

by organized religion, by the country, and he feels that it would seem to me that he is showing the disrespect on the part of the people involved in these organizations, rather than disrespect for the flag itself.

Mr. Green: May I have People's Exhibit 1, please, or People's [94] Exhibit 2?

Judge Strong: Yes.

Q. I show you here People's Exhibit 2. That is the hanging figure in the noose. Could you tell us what, to you, the artist appeared to be protesting here?

Mr. Slater: I object, as this question is improper on redirect.

Judge Strong: There seems to be improper redirect examination.

Mr. Green: I would agree with your Honor. I feel, however, the People have opened this whole field, what the protests are, by picking and selecting one exhibit from the whole group, which I must say which has been picked deliberately obviously because of its sexual connotation rather than any other. There is no charge of obscenity I must emphasize, and the selection of that one of all these exhibits adds to what might be protested here I think puts an unfortunate coloration on the defendant's case, and for that reason I [95] felt the People have opened their door on the cross-examination to bring in the subject of what was being protested in these various—

Mr. Slater: Nothing new has been brought in, your Honor, by the People's cross-examination of

this defendant. The defendant's counsel has ably pointed out these objects are, in fact, protestations. This could have been brought out on direct examination of this witness.

Judge Strong: We'll permit it, what the construction means to him in the way of protest. I don't think we should go through each one of these exhibits.

Mr. Green: My only purpose, your Honor, was not to leave this one thing which comes out, way out of context. I would have no objection with this one, and I'll let it go with this.

Judge Strong: We are aware this is not an obscenity case.

Mr. Green: Read the question [96] to the witness.

(Reporter read the question.)

Q. What do you feel this is? A. I believe, as I read it, it is the artist, he is questioning whether the people of the United States are really being allowed the kind of freedom they are supposed to be allowed under the Constitution. In fact, I read it as freedom of speech and other freedoms being hanged by the noose, and the flag is symbolizing this.

Mr. Green: No further questions.

Judge Comerford: Counselor, are you telling the Court in your last answer that is your conception of what is means or what is the artist's conception of what it means? A. That is my conception.

Judge Comerford: What is your conception of these items that you displayed in your business; what was your purpose in displaying them? A. I displayed them because they were works of art, [97]

and because of all other works of art in the gallery they were for sale.

Judge Basel: You may step down.

Judge Strong: Anything further?

Mr. Green: We have one further witness. It's ten of 1:00 now, and he'll not be available until after lunch. I would like to ask if we could take the lunch recess and then bring him in.

Judge Strong: You're supposed to be ready at the start of the trial.

Mr. Green: Your Honor, you are absolutely right. We have a witness who, unfortunately, we have no control of. He is coming here. He is under subpoena, but at the same time it's now ten to 1:00, but we figured we would be running about this way and his testimony will perhaps—

Judge Strong: What is the purpose of the author?

Mr. Green: The purpose of [98] putting this witness on, I'll tell you who the witness is, your Honor. Witness is Mr. Hilton Kramer, who is the art news editor and art critic for the New York Times, and a well established figure as an expert in contemporary art, and in terms of 19th and 20th century art particularly. In fact, he is going to be lecturing at Ohio State, and the purpose in putting Mr. Kramer on is to emphasize the various materials in art, sculpture and painting today, that these things clearly are works of art. He is one of the critics that reviewed this show and the works of art that were there. The art need not be beautiful or attractive to me or the District Attorney and that as such, and they come and since they meet these qualifications or purposes—

Judge Strong: I don't know if that is an issue, whether they are works of art or not. The statute doesn't refer to works of art.

Mr. Green: It doesn't, [99] your Honor, but while the statute doesn't, if these are works of art, well, let me say this to you, I think whether they are works of art is just forms of expression which is completely protected by the First Amendment.

Judge Strong: Then why do we need an art expert?

Mr. Green: Will the District Attorney like to concede these are works of art?

Mr. Slater: The People will not do this, and the People will be glad to call people to testify whether they are objects of art, and it is not an issue whether there has been a defilement of the defacing of the flag.

Judge Strong: Within the prohibition of the statute.

Mr. Slater: Yes, precisely.

Mr. Green: But the statute makes exception for ornamental pictures when we say also applies to sculpture. Furthermore, [100] the witness we are calling, People could call anybody they want if the testimony is pertinent, but the witness we are calling is an expert.

Judge Comerford: He is an expert?

Mr. Green: He'll either qualify as an expert or he'll not. If he doesn't qualify as an expert then I'm wrong, but if he qualifies as an expert then his testimony is pertinent and relevant. Obviously, I can't qualify him. I'll attempt to, and you Judges will determine whether he is an expert.

Mr. Slater: This is not whether they are works of art. It's whether they fall in the purview of the statute.

Mr. Green: It would be nice for the District Attorney if things were as he says, but unfortunately I don't believe it's correct. It is a very definite issue as to whether these things fall in the purview of the statute. You have many questions, one, the basic question of the matter, are they excluded from the wording of the statute by [101] the language? Then, of course, if the Court says, no, they are not excluded, they are not protests, then you come to certain constitutional questions and we do have Supreme Court questions whether these are works of art or protest works of the expression that the State has no power to do anything against them, and that being the case, this does become relative. And I would say the First Amendment issue is a basic issue, an applicable issue, whether they are considered works of art or not, that wouldn't make any difference, the First Amendment issue would be the same.

Judge Strong: 2:00 o'clock.

(Case adjourned until 2:00 P.M.)

Court Officer: Case on trial, Stephen Radich.

Mr. Green: I have a subpoena here.

Judge Strong: Is your witness here?

Mr. Green: Yes, he is here.

[102] Judge Basel: Raise your right hand. Do you swear the testimony you give in this case will be the truth, the whole truth and nothing but the truth, so help you God?

Mr. Kramer: I do.

Hilton Kramer—for Defendant—Direct

HILTON KRAMER, having first been duly sworn, testified as follows:

Court Officer: Be seated. Please, in a loud, clear voice, give your name and address.

A. My name is Hilton Kramer, and I live at 238 Dean Street, Brooklyn, New York.

Court Officer: Your business or occupation?

A. I'm the art news editor of the New York Times.

Court Officer: Answer all questions in a loud, clear voice, please.

Direct Examination by Mr. Green:

Q. Mr. Kramer, how long have you been the art news editor of the New York Times? A. Since November, 1965.

[103] Q. What are your duties in that position? A. My duties are to review contemporary exhibitions of painting, sculpture, primarily in New York, also across the country and abroad, and I'm also the editor of the Sunday art page. In that capacity I commission other writers to write on the same subjects.

Q. Previous to your employment by the New York Times, did you have other employment as an art critic? A. Yes, I have been the art critic for the New Leader and for some years the art magazine in Contemporary Art.

Q. Have you ever taught on art history or on art? A. Yes, I've been on the faculties of universities, Colorado, also Bennington College in Bennington, Vermont.

Q. Outside of the publications you have worked for as an art critic, have you ever written for any magazines?

A. I've been widely publicized in art, in the American Art Form, Art International, New York Times [104] Book Review, Cosmopolitan Shows, Hudson Reviews.

Q. Are you a member of any professional Societies of art critics? A. Yes. I am a member of the International Art Critics Association.

Q. Do you from time to time lecture outside the college teaching you mentioned on the subject of art? A. Yes. I lectured widely at the universities, museums, art societies, conventions of art, teachers and art schools.

Q. Is there any particular field of art on which you generally lecture? A. Well, mainly 19th and 20th century art, but I very frequently lecture about the 20th century sculpture, and I will be lecturing on that subject at Ohio State and Columbus.

Q. Have you ever been judge of any art competition? A. Yes. I judged exhibitions in the west, in Minneapolis, in New York State and Tennessee, and have turned down requests to do so in more cities than I [105] can enumerate.

Q. Now, sir—

Judge Comerford: Excuse me. Where did you get the training and experience that qualified you to do these things that you tell the Court that you're now doing?

A. Well, I've been, I've had a thorough university education.

Judge Comerford: What university?

A. Syracuse, where I got my Bachelor of Arts, Columbia, Harvard and the New School for Research.

Judge Comerford: Did they all teach art?

A. I beg your pardon?

Judge Comerford: Are you an artist?

A. No. I painted when I was younger, but I am not an artist today. I grew up among artists when I was younger, and I have frequently associated with artists for as long as I can remember.

Q. How old are you, Mr. Kramer? A. 39.

[106] Judge Basel: Have you had any formal art training?

A. Well, I studied painting under the W.P.A. art in the thirties.

Judge Basel: When you went to college did you major in art?

A. No, I did not.

Q. Now, in terms of your familiarity with 20th century art, and you've mentioned 20th century sculpture, will you tell us what materials—I withdraw that question.

Judge Strong: Just a minute. Do the People have any objection to the witness testifying as an expert in modern art?

Mr. Slater: I have not heard the questions if he is going to be called for his expertise.

Mr. Green: Yes.

Judge Strong: He is being offered as an expert, as I understand.

Mr. Slater: The People object to it. The People object as to the [107] expertise because the People's contention is there is no need for expertise.

Judge Strong: That is not the question. The only question is whether you accept the witness.

Mr. Slater: I'll accept him.

Judge Strong: Proceed.

Q. About how many art exhibits in sculpture and painting have you gone to in the last year, Mr. Kramer? A. Oh, probably something in excess of 500.

Q. Was this about the number you've attended over the last seven or eight years? A. Yes.

Q. Now, will you tell us, in connection with 20th century art, what are the materials of 20th century artists; what are they using in sculpture and in painting? A. Well, that question is perhaps best answered in the negative because there is virtually no material which contemporary artists are not applying in some form or other, whether it be fabric, plastic, pigment, [108] metal or whatever. Offhand, I can't think of any physically existing material that has not been applied in some form or other in a work of art.

Q. These works are shown in museums and art galleries showing these materials? A. Yes, they are.

Q. How would you define a work of art, Mr. Kramer? A. I would define a work of visual art as any physical object specifically whose visual properties specifically designed to communicate an aesthetic emotion.

Q. Is the communication of aesthetic emotion necessarily an emotion of pleasure or beauty? A. No. It has been specifically a characteristic of the modern movement in art that aesthetic emotion is considered painful or combinations of pleasure and pain or any degree in between.

Q. Now, I show you here a group of exhibits. They are People's Exhibits #1 through 9, and I ask you to look at these, please. A. Yes.

[109] Q. Are those photographs representations of figures or sculpture which you have seen in the past? A. Yes, I have.

Q. And where did you see them, and what were they? A. I saw them on exhibit at the Radich Gallery sometime in December, I believe, I don't remember the exact date, on my formal reviewing, around on a Thursday, which is the day I normally go to the galleries for the purpose of writing my reviews for the Times.

Q. What brought you to the Radich Gallery on that day? A. Well, at the art news desk we received an announcement of every exhibition taking place in New York, and my colleague and I go over these announcements and decide which exhibitions and which galleries we are going to visit that week. And I drew the Radich Gallery that week and included it on my list.

Q. I show you here Defendant's Exhibit B and ask you if this is the same as the announcement which you received or saw for this exhibit? A. Yes, it is the same.

[110] Q. Had you answered, did you, in the course of your work, rate a review of the Morrel exhibit at the Radich Gallery? A. Yes, I did.

Q. I show you here a newspaper clipping and ask if that contains your review? A. Yes, it does.

Q. Would you tell us what day's paper of the New York Times this appeared? A. December 21st, 1966.

Q. That was a Saturday? A. A Saturday.

Mr. Green: I would like to offer this in evidence as Defendant's Exhibit D, I believe.

Mr. Slater: I object to the introduction. The composer of this article is present in Court. I have no objection to him testifying what he wrote about. I

feel that it's improper to introduce this article into evidence.

Judge Strong: You want him [111] to recite the whole article word for word?

Mr. Slater: No, but he could state to the Court what his opinions were at the time that he reviewed this exhibit. I see no need to introduce into evidence this article.

Judge Strong: This is just a means of saving time. It seems no point in having to repeat everything that is in the article.

Mr. Slater: It seems to me procedurely—

Mr. Green: I wouldn't push it.

Judge Strong: It's pointless to make such an issue of it. Technically, the objection has to be sustained.

Mr. Green: I won't push it if the District Attorney wants to stand on his objection.

Q. The purpose of offering it, I should state for the record, was not to give the witness' opinion of [112] the show that he saw but to indicate that this exhibition was—

Judge Comerford: Why don't you ask him what his purpose is rather than you?

Mr. Green: I am not trying to testify. I am trying to give the purpose for which I was giving the evidence.

Judge Comerford: It was ruled out, so it serves no purpose. Let's move on.

Q. Have you seen other works of art at the Radich Gallery; have you reviewed other exhibits there? A. Yes, I've reviewed exhibits there frequently.

Judge Strong: In connection with that previous ruling there was such a review written for the newspaper?

Mr. Green: That is my only point.

Judge Strong: It's in evidence now.

Mr. Green: That is why I don't press the business of using the exhibit.

Q. Do you consider Mr. Radich's gallery a [113] serious gallery, exhibiting works of art? A. Yes, I so consider it, and I think it is generally so considered in the New York art community.

Q. On the basis of your definition—withdraw that. Now, you are familiar with the general term, protest art? A. Yes, I am.

Q. On the basis of what you have given us as your definition of works of art and your knowledge of 20th century art, would you say, in your opinion, that the works which are shown in the exhibits, People's Exhibits 1 through 9, represent works of art? A. Yes, it is my opinion they represent works of art.

Judge Strong: Did you say they give rise to an aesthetic emotion?

A. Yes, I would.

Judge Strong: Could you name what emotion that is?

A. Well, I would have to say that I think that the only emotions they give rise to, these aesthetic emotions, because my own view of them as in their [114] extra-artistic capa-

city, is that they are not very interesting. I don't think they are very high form of art, but I none the less think they attempt to come to grips with certain formal problems in sculpture that now have a tradition of fifty years behind them. I don't think they do this extremely well, but I think their intentions are serious in that direction.

Q. Now, you testified in answer to the Judge's question, Mr. Kramer, that in their own aesthetic aspect you did not think these were so great. Do you mean in protest art? A. Yes, in works of protest art I thought they were rather feeble because, in my view, the artist was much more engaged by the visual spectacles of his materials by whatever social intent that may have been laid with them.

Q. The fact that they failed, in your view, as works of protest art, did that make them any the less works of art? A. Not at all, if, in fact, it made them more exclusively works of art.

Judge Strong: Because they [115] are more of an aesthetic than a—

A. Yes, in my view, yes.

Judge Comerford: Would you care to select one and describe to us what aesthetic emotion arises from 1, People's 2 and 3; as a beginner, tell us what emotions, aesthetic emotions, arise from observing either 1 or both of them?

A. Well—

Judge Comerford: Take one at a time.

A. Yes, this is 3. They are actually two views of the same figure, both of these exhibits. These sculptures are clearly

intended to be figures clearly intended to show a male figure with his phallus erected.

Judge Comerford: What do you mean by his phallus? Some people don't understand that word.

A. With his male sexual organ erected. And I assumed when I first saw this work that the artist was making it quite familiar with social military violence, with sexual excitement and social that one sees on [116] numerous television shows and movies and novels and so on. However, as an art critic, that seemed to be a very minimal idea, and I was much more interested in the design of the figure, the fact that it was symmetrical, rearranged in the kind of cross form with this sort of textural effect as a kind of face and chest, a red cross on one sleeve, etc. These are more or less the aesthetic association. I seem, with this figure it seemed well done. I couldn't see that it had much substance, but as an artistic idea I would place it low but well in the category of the artistic accomplishment.

Judge Comerford: What is it supposed to arouse in the public? You told me a lot but you didn't answer my question.

A. Well, I'm not sure it's possible to describe an aesthetic emotion being other than itself. I am not sure then.

Judge Comerford: Describe what an aesthetic emotion is.

A. An aesthetic emotion, I would suggest, is an emotion derived from the observance from a form of a [117] thing rather than any of its aspects to make it in every categori-

cal term, and that is being one that derives from the form rather than the object.

Mr. Green: I have no further questions.

Cross-Examination by Mr. Slater:

Q. Now, you've viewed the exhibits which are People's 1 to 9, and you've personally seen the subject matter on display at the Radich Gallery. Could you describe any of these objects as being an ornamental picture? A. I beg your pardon?

Q. Would you call any of these particular objects which are in question an ornamental picture? A. No, I would describe them as an ornamental sculpture.

Q. Would you describe any of them as an article of jewelry? A. No.

Q. Now wouldn't you say it was your feeling that the artist who constructed these objects was more [118] or less getting a kick out of doing this than trying to make some sort of protest or political protest, some sort of personal gratification rather than trying to express himself in a political vein? A. I would have to answer that question in two stages, if I may, one, in terms of what I took to be the artist's intentions, and the other, what I took to be his success in realizing it. As to the first, I took it to be the artist's intention to be creating a form of art which was making a social commentary.

Q. How did you reach this conclusion? A. Through my familiarity with this medium, this as an art medium.

Q. Have you seen, in the past, numerous exhibits of art in the form of a social protest? A. Yes.

Q. Now, as to what was conveyed, what was your idea?

A. As to my statement of his success in making the social commentary, I felt it was minimal. I felt as an artist he was much more, he was much more engaged by the visual spectacle of the materials he was dealing [119] with than in conveying any social commentary.

Q. Now you said these exhibits were well within the framework of what we call art; now wouldn't you say that he would call almost any object on exhibit in a gallery an object of art, some having more matter than other objects? A. Yes, anything specifically designed to be a work of art, whether it's poor or high quality, is a work of art.

Q. What would you call something of high quality to be a work of art? A. Are you asking me to repeat my last definition?

Q. What a work of art is.

Judge Strong: He has given that on direct examination.

A. I would say a work—

Judge Strong: Just a minute.

Mr. Slater: I withdraw the question.

Q. I ask you to examine People's 2 in Evidence. A. Yes.

Q. At the time you viewed this, what was your [120] opinion as to the message, if any, which was conveyed by the artist? A. I didn't take the work of art to be one that communicated a message exactly. It seemed to me an attempt to make a certain kind of form suspended from the ceiling, which is a familiar modern sculpture device, and among such attempts this seemed to me not an interesting one.

Q. Then you didn't personally gain any particular protest from this object? A. I felt it was the artist's intention to communicate something, but I personally did not feel politically stimulated by it.

Q. I am going to show you People's Exhibit 6, which you viewed this object at the gallery. Did you receive or was a political message conveyed to you by this artist? A. No. Once again, I would have to say the artist probably intended to convey a political message but of the social, of the materials involved also because there was a sound track in the gallery at the time and anti-war songs.

[121] Q. Please confine yourself to the opinion of the objects themselves, not the surroundings. A. I am trying to make clear what my experience was with the object on my first encounter. My own interest was purely a sculptural one. It seemed to me to take its place in what I say perfectly valid tradition and none the less not to be a very lofty example in that direction.

Q. I ask you to examine People's Exhibit 5. When you saw this object at the Radich Gallery, was any political message conveyed to you at that time? A. Once again, I felt the artist intended a political message, but my own interest in the object was aesthetic rather than political.

Q. Well, sir, were there any objects that were on exhibition at the gallery of those that we have introduced into evidence which conveyed to you a political message? A. No, I would say in the exhibition as a whole my impression was that the artist intended to convey a political message by his form of art, but my own interest in the exhibition was primarily aesthetic.

[122] Q. In viewing each of these objects individually, you could say no political message was imparted to you, is that correct? A. I would have to say I was aware that a

political message was intended but perhaps was not as interested in that. The intention wasn't as strong as the aesthetic intention.

Q. But there was none conveyed, no political message to you? A. Well, I suppose in some degree it was conveyed; if I was aware of the tension I was perhaps not receptive to it.

Q. Did you, in fact, get any message from any of these exhibits in the political vein? A. Well, I was—

Q. Something that was concrete?

Mr. Green: Let the witness answer.

Q. Something that was concrete in its form to you? A. Well, I was aware that the artist intended to make some anti-war statement, but I was not as receptive [123] to that intention as I was to the aesthetic intention which seemed much stronger.

Q. So then all you gained was an artist's attempt at some political message but none was conveyed in fact, to you? A. I think that is a reasonably correct.

Mr. Slater: I have no further questions.

Redirect Examination by Mr. Green:

Q. Mr. Kramer, there has been a reference to the message you got from a specific work in the exhibits in terms of the message the viewer gets from a work of art, sculpture, painting, whatever it is, collage; is the message that the viewer gets always the same for all viewers?

Mr. Slater: I'll object to the question.

Judge Strong: Yes, I have to sustain it.

Q. Is it your experience—

Judge Strong: That would be [124] a question for a psychologist.

Q. Is it in view of the work of art that you, as critics, see and the critical writings, and you, as a critic reading it, is it your experience all viewers get the same message from any given work of art? A. On the contrary, the diversions of response to works of art are notorious.

Q. The fact that you did not get a political message from these works of art, did this mean to you that nobody would get a political message from them?

Mr. Slater: I object to that question.

Judge Strong: Sustained.

Q. In terms of the works of art, Mr. Kramer, as critic do you recognize any difference between different types of art, sculpture, paintings, collage, in the 20th century?

Mr. Slater: I object to the question as to the form.

Judge Strong: He is not finished with the question.

Q. I'll rephrase the question. In terms of [125] 20th century art, sculpture, painting, collage; construction, are there any hard and fast distinctions that could let you label one as one thing and not another; are there things both considered three-dimensional works and paintings? A. The entire tendency is to break down distinctions between one category and another. There are still some sort of rough working categories, paintings, collage and so forth. At this history there is no hard and fast distinction.

Q. Are you familiar with the work of Louise Nibelson?
A. Yes, I am.

Mr. Slater: I will object. I think the People have been very liberal to question the defendant on redirect, but we are going too far astray on redirect. This could have been brought out on direct examination.

Judge Strong: Objection sustained.

Mr. Green: I have no [126] further questions.

Mr. Slater: No questions.

Judge Strong: Defendant rests?

Mr. Green: The defendant rests.

Mr. Slater: People rest.

Mr. Green: At this point, if it please the Court, I should like to renew my motion to dismiss on all the grounds, and without going into them with great detail that we stated at the close of the People's case, on the grounds the People have failed to make out a prima facie case. I would like to point out here, however, with specific respect—

Judge Strong: We ruled on a prima facie case.

Mr. Green: Yes, I understand that. I am renewing my motion now to dismiss at the close of all the evidence on the grounds that no case has been made out beyond a reasonable doubt that this defendant violated this statute. I think it's unnecessary [127] to restate, except for the record, that I restated the grounds that I made on the close of the People's case. To that I would like to add this: the only evidence in this case, what this defendant did, is that he was the proprietor of the art gallery in which these things were exhibited. There is no testimony whatsoever,

I am reading from subdivision d, "mutilated, defaced, defiled, defied," I don't know how you defy a flag, something, it could be done or trampled upon the flag. There is only one other thing left in subdivision d, and that is "cast contempt." As far as subdivision d, it doesn't say what you cast contempt on. That is the only subdivision in there.

Judge Strong: You made a point of that several times. I think, as a matter of construction, it's quite clear. It refers to the United States flag of America.

Mr. Green: I am not sure it does. All the other sections that mention that—

[128] Judge Comerford: I don't mean to interrupt you for the sake of interrupting you.

Mr. Green: I am going on from there.

Judge Comerford: What is the object of the entire subject?

Mr. Green: I would say the object of the entire section is something that the State has no power to do it. It was to restrain the conception of—

Judge Comerford: Give me the noun.

Mr. Green: Your Honor, I can't tell you that because the entire section doesn't have a noun. That is the very point I am making. The very letter subdivision in Section 16, subdivision 16, has no noun except number d, but if I may move on and not labor the point—

Judge Comerford: I was not talking about subsection d. I am talking about the section; what is the object of the entire section? Give me the noun of the entire section.

[129] Mr. Green: I can't tell you because if you take 1425 itself, malicious injury, to an injury of

property, it has to do with cutting timber, taking fish out of property.

Judge Strong: Subdivision 16.

Mr. Green: Subsection 16 refers in general to the flag, but subdivision d doesn't say a word about the flag.

Judge Strong: Is the word "flag" a noun or not a noun?

Mr. Green: It is a noun but it is not in subdivision d.

Judge Comerford: You say it's the subject of Section d?

Mr. Green: I don't say so. I say all the other subdivisions have as their objects the flag, but this one does not. But if I may go on, assume the word "flag" is read into subdivision d, although it's a criminal statute, I don't know how you could do that, assuming it's read in it, there is no testimony [130] that he mutilated the flag, defaced. He didn't make these sculptures, defiled it, trampled upon it. The only thing he did, his causing contempt upon it by exhibiting these sculptures. Now subdivision f is a charge that any person who shall publicly carry or display any emblem or flag which causes contempt upon the flag of the United States by word or act, so that you're limited here to what we are limited in considering this case is even, if you read the word "flag" into subdivision d, the only thing that is left in subdivision d on the evidence of this case is causing contempt, and the only thing in subdivision f is causing contempt. Causing contempt, by the nature of the word, involves intent. This is prohibited, such as the words, "causing contempt." You have to mean

something. You have to mean contempt to cause something into contempt. If you walk on a boy, a flag, and trip on it and knock it on the floor, that is not causing contempt. That requires some kind of affirmative reaction, [131] contempt. The only testimony in this case is by the defendant, who testified without contradiction by anybody that he intended no contempt of the flag. He is the defendant, not the artist. So on the basis of the grounds stated on my motion to dismiss at the close of the People's case, I move to dismiss now at the close of all the evidence, and on the further grounds that the People have failed to show any violation of either subdivision d or f of subsection 16 of this section of the Penal Law, because they have failed to show any causing of contempt, any intent to cause contempt, which is required by the nature by the defendant.

Mr. Slater: Subdivision d requires that the mutilation, defacement, defilement, trampling upon that caused contempt be done in public. The gallery, as the defendant states, was open to the public. Anyone could go there. In fact, one of the exhibits was on display in the window which was open [132] on the public street, as the People's witness has testified to. The People contend that by his act the defendant did cause contempt upon the flag as stated in subdivision d. As to subdivision f, this subdivision says: "Any person who shall display any emblem, plaque or flag which causes contempt by either word or contempt on the flag of America, violates this section." This statute clearly prohibits the conduct that this defendant was engaged in at the time these objects were on display at the gallery. These ex-

hibits very clearly cause contempt upon the flag of the United States. Viewing People's Exhibits 2, 3 and 4, I fail to see how anyone could interpret this conduct in any other way, and certainly the others of very little merit, and the People contend they, too, caused contempt upon the flag. Now, as far as the words "deface" and "defile" are interpreted, as I said earlier at the close of the State against Slaughter, the words "deface" and "defile" in a similar statute [133] were interpreted to mean dishonor, which imputes a lively sense of shaming or acquiescent callousness. Certainly the flag was shamed by the artist and the man who exhibited these flags. People rest.

Judge Strong: The bench feels that it needs a short period of time to consider this verdict. We will not be able to render it today. We'll put it over for Friday for decision.

Mr. Green: 9:30?

Judge Strong: Yes, thereabouts.

Mr. Green: I would like to thank the Court on behalf of the defendant. I think the issues here are complicated issues. I think they are very interesting issues, and I am grateful for the Court for giving them such careful and courteous attention, and I am also grateful for the Court's questions that sometimes gave me questions and made my questions a lot easier to make the point involved, [134] and I do appreciate the questions and thank the Court for them.

Mr. John J. Connley: Your Honor, my name is John J. Connley. I am counsel for Francis Giordano, the Judge Advocate for the American Legion. Your

Honors, due to the fact the evidence is over and the Court reserves decision, this is permission to file for amicus curiae.

Mr. Slater: No objection.

Mr. Green: I have no objection. I would like to be served with a copy of the brief. I don't know when the brief will be served.

Judge Strong: You have one ready.

Mr. Connley: Your Honor, we have done research. I would like to have it for Friday's decision.

Judge Strong: Will all parties please approach the bench.

Judge Basel: I think the [135] case was extremely well tried on behalf of both sides and I appreciate the fact that they have made it easier for the Court.

Judge Strong: Court will take a short recess.

The above is certified to be a true and correct transcript of the testimony.

MICHAEL JAY (Illegible)
Official Court Reporter.

Transcript of Sentence

CRIMINAL COURT OF THE CITY OF NEW YORK

PART 2B — COUNTY OF NEW YORK

Docket: B196

Charge: 1425

THE PEOPLE OF THE STATE OF NEW YORK,

Complainant,

—against—

STEPHEN RADICH,

Defendant.

---

100 Centre Street
New York, New York

May 5, 1967

Before:

HONORABLE FREDERICK STRONG
HONORABLE AMOS S. BASEL
HONORABLE JAMES J. COMERFORD

APPEARANCES:

GERALD SLATER, Esq.
Attorney for the People
Assistant District Attorney
155 Leonard Street
New York, New York

RICHARD GREEN, Esq.
Attorney for the Defendant
1270 Avenue of the Americas
New York, New York

JAMES RYAN,
Court Officer

RICHARD GROSS,
Court Reporter

[2] Court Officer: Number 35. Docket B196. Stephen Radich. Charged with 1425, Subdivision D and F of the Penal Law. This case is on the calendar for decision today.

Mr. Green: Richard Green, 1270 Avenue of The Americas.

Judge Strong: This case is on for decision today. I take it neither side has any further argument to make.

Mr. Slater: That is correct, Your Honor.

Mr. Green: That is correct.

Judge Strong: Both sides are ready for decision. By majority of the Court, the motion to dismiss is denied. The defendant is found guilty of the violation of Paragraph D, Subdivision 16, of Section 1425 of the Penal Law of the State of New York. Judge Rosel dissents and votes to acquit. I will deliver the opinion of the Court.

* * * * *

[The verbatim reading of the majority and dissenting opinions of the trial court are omitted. The opinion of the trial court is reproduced at pp. 25a-36a.]

* * * * *

[20] Judge Strong: Does the defendant wish to waive the two day period and be sentenced at this time or not?

Mr. Green: We will waive the two day period, Your Honor. May I note my exception to the denial of the motion to dismiss.

Mr. Slater: The People have no objection to sentencing at this time.

Mr. Green: May we be heard?

Judge Strong: Yes.

Mr. Green: On the question of sentence the Court has found the defendant guilty. I would like to point out here—

Judge Strong: Stand up.

[21] Mr. Green: I would like to point out here that the defendant is also a war veteran and there has been this matter of the flag. The defendant is an honorably discharged war veteran who served in the Navy during World War Two, was a radio operator on the ship that carried the President of the United States to the Teheran Conferance and was in a sufficient position of trust to hold such an assignment in the Navy. I would also like to say that in terms of an issue such as this, forgetting the obvious questions of constitutionality, this Court which is really—this is the People's Court. This is the court, probably the court with which most of the people—to most of the people of New York is the only court which they will ever come into contact. I think this court has to take notice of the life around it in this great city of ours and this great state of ours. I pointed out in a reply brief and we are on sentencing. There is a painting using the American flag with potatoes inserted in the field of stars with a picture of the Governor of the State of New York in the stripes. This painting was, and I show it to the Court here, on the cover of the New York Times just two or three weeks ago, a notable [22] publication distributed not only in this state but throughout the country. Since that time the governor's collection of paintings is now opened and on display on 12th Street in New York at the New School and the circular advertising that art exhibit, Governor Rockefeller's collection from the Albany mansion uses for the ad that painting of a proported American flag with, I presume, Idaho potatoes stuck into it the word "Idaho" and a picture of the Governor of the State of New York put in among the stripes. What I am saying to the Court is essentially here as the District Attorney pointed out in his brief. There is a question of obscenity in this case. The issue is strictly the use of the flag. What

I am saying to the Court is that in this day and age the flag is used for many, many purposes. We introduced some exhibits at the trial. This, which is not an exhibit at the trial but which is something that exists in this city of ours, it is here today. It is as real as those buildings going up across the way. A court such as this, a People's Court, must take notice of the custodies of the mores of the city. I am sure that there are many of us who would feel to take potatoes and tear open a [23] hole in the flag and throw the potatoes in is contemptuous of the flag. It may well be. It doesn't mean it is something that should be prosecuted or forbidden, something for which a man should go to jail if he does it. In view of these things and in view of the use that is made of the flag all around us, you look at the theatrical ads in the newspapers in New York. There has been one running for a show I guess it is, which is the "Fugs" which uses an American flag. It goes in day after day in every paper in this city. There aren't many but we still have a few. That is in there every day and nothing happens. That is the life around us. This is what happens in the life around us. It seems to me that to impose any severe sentence, anything but a minimal sentence and then a suspended sentence at that on this defendant would be going contrary to everything that is happening in this city, in this state, and in this country today in terms of the use of the flag for purpose of expression.

Judge Strong: Thank you.

Mr. Slater: People have no statement to make.

Judge Strong: The Bench will confer. [24] Is there any legal cause why the defendant should not now be sentenced?

Mr. Green: No, Your Honor.

Judge Strong: Does he have any previous criminal record?

The Defendant: No, Your Honor, I have not.

Judge Strong: The Court takes a very serious view of this case and believes it should not be treated lightly. On the other hand the defendant, having no previous record as he says and having been apparently sincerely motivated, we do not feel that a prison term is indicated. However, we do feel that a substantial penalty should be imposed. The Court therefore sentences the defendant to pay the maximum fine of $500 in lieu thereof to serve 60 days in the Workhouse.

Mr. Green: Could I ask the Court to permit the defendant to pay his fine on Monday, May 8th that would be, and he be paroled in the meantime?

Judge Strong: Yes, parole continued to May 8th to pay the fine.

Mr. Green: Can we have a little more time? Can we make it a week from Monday? That [25] would be the 15th.

Judge Strong: All right, the 15th. Parole continued.

* * * * *

/s/ Richard Gross

I Certify That This Is a True and Accurate Transcript.

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SUPREME COURT

SUPPLEMENTAL APPENDIX
CASES REFERRED TO IN APPEAL

In the

Supreme Court of the United States

October Term, 1970

No. 169

Stephen Radich,

Appellant,

—v.—

People of the State of New York,

Appellee.

On Appeal from the Court of Appeals of the State of New York

JURISDICTIONAL STATEMENT FILED MAY 18, 1970
PROBABLE JURISDICTION NOTED OCTOBER 19, 1970

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 328—September Term, 1970.

(Argued November 12, 1970 Decided December 24, 1970.)

Docket No. 35287

LONG ISLAND VIETNAM MORATORIUM COMMITTEE, NASSAU COUNCIL OF WOMEN STRIKE FOR PEACE, BARBARA SPADANUTA, MAE NEWBURGER, RHODA SEIDEL, and BARBARA SHACK,

Plaintiffs-Appellees,

—v.—

WILLIAM CAHN, District Attorney, Nassau County,

Defendant-Appellant.

Before:

LUMBARD, *Chief Judge,*
WATERMAN and ANDERSON, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Eastern District of New York, sitting as a three-judge court convened pursuant to 28 U.S.C. §§2281 and 2284, declaring §136(a) of New York's General Business Law constitutional as properly applied, but holding that it did not apply to appellees' emblem which consists of a circular representation of the American flag upon which the peace symbol is superimposed.

Affirmed on the ground that §136(a) is unconstitutional.

BURT NEUBORNE, New York Civil Liberties Union (David Orlin and Wade Hooker, on the brief), *for appellees.*

STEVEN M. HOCHBERG, Deputy Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York and Samuel A. Hirshowitz, on the brief), *for appellant.*

LUMBARD, *Chief Judge*:

This is an appeal from a judgment of the Eastern District of New York, sitting as a three-judge court convened pursuant to 28 U.S.C. §§2281 and 2284 which declared §136(a) of the General Business Law of New York constitutional as properly applied, but held that it did not apply to plaintiffs' emblem—a representation of the American flag on which is superimposed a symbol that resembles an inverted trident and is generally recognized as the traditional peace symbol.

Section 136(a) provides that it shall be a misdemeanor to display "any word, figure, mark, picture, design, drawing, or any advertisement" upon any "flag, standard, color, shield, or ensign of the United States of America."[1] The statutes defines "flag," as used in this section to include

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1 Section 136(a) provides in full:

§136. *Exhibition or display of the flag*

Any person who: a. In any manner, for exhibition or display, shall place or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement, of any nature upon any flag, standard, color, shield or ensign of the United States of America, or the state of New York, or shall expose or cause to be exposed to public view any such flag, standard, color, shield or ensign, upon which after the first day of September, nineteen hundred and five, shall have been printed, painted or otherwise placed, or to

"any flag, standard, color, shield or ensign, or any picture or representation, of either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of, said flag, standard, color, shield or ensign, of the United States of America, or of the state of New York, or a picture or a representation of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, colors, standard, shield or ensign of the United States of America or of the state of New York."

We hold that §136(a) is unconstitutional both on its face and as applied in this case.

On January 15, 1970, defendant William Cahn, the District Attorney of Nassau County, announced at a press conference that he would, on complaint of any person, prosecute under §136(a) anyone displaying or distributing a representation of the American flag which has superimposed upon it any symbol, design, or word. He specifically mentioned as violative of the statute the emblem widely circulated by the plaintiff organizations and the individual plaintiffs in the form of a decal and a button.

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which shall be attached, appended, affixed or annexed, any word, figure, mark, picture, design, or drawing, or any advertisement of any nature

* * * * *

Shall be guilty of a misdemeanor.

Other subsections of the statute are specifically directed at physical uses of the flag, as defined in the section, which tend to "cast contempt upon" the American flag. §136(d) and (f). The statute also prohibits raffling or placing in pawn any such flag or representation thereof §136(e), as well as public use of it as a receptacle for depositing or collecting money §136(g).

That emblem consists of a circular representation of the American flag, having seven stars in the upper left-hand corner and eleven stripes and colored red, white and blue, upon which the peace symbol is superimposed. (See Appendix.)

On January 19, plaintiffs obtained from Chief Judge Mishler an order directing D.A. Cahn to show why he should not be enjoined from carrying out his announced intention to prosecute those wearing plaintiffs' buttons and to show cause why a three-judge court should not be convened to determine plaintiffs' challenge to the constitutionality of §136(a). The action was based on the Civil Rights Act, 42 U.S.C. §1983. At this time Cahn promised that he would refrain from commencing prosecutions during the pendency of the federal proceedings. On January 27, Judge Bartels ordered the convocation of a three-judge court; that court consisted of Circuit Judge Moore, and District Judges Bartels and Travia.

On June 22, 1970, the district court issued its decision declaring §136(a) constitutional as properly applied; but holding that it could not be applied to plaintiffs' emblem since that emblem did not constitute a flag. Judge Moore, writing for himself and Judge Bartels, stated that plaintiffs' emblem did not come within the proscription of §136(a) because "[i]t is the flag itself which the statute seeks to protect from physical alteration, and no attempt to alter an actual American flag is presented by the plaintiffs' buttons and decals." In reaching the decision, Judge Moore concluded that the New York Legislature in enacting §136 could not possibly have intended that the statute should apply to the wearing or distribution of such emblems as those of the plaintiffs. Judge Travia, concurring in part and dissenting in part, agreed with the majority that

the statute was constitutional, but believed that it clearly proscribed plaintiffs' emblem and that such a proscription was justified by the state's interest in protecting the integrity of the flag.

Since Cahn had pledged to respect the district court's decision pending appeal, that court issued no injunctive relief. Accordingly, Cahn appealed to us pursuant to the newly enunciated rule of *Mitchell* v. *Donovan*, 398 U.S. 427 (1970), in which the Supreme Court held that an order granting or denying only a declaratory judgment must be appealed to the Court of Appeals rather than to the Supreme Court. We affirm the district court's decision on the ground that §136(a) is unconstitutional.

The first contention which appellant Cahn urges is that the district court should have abstained from deciding the case since it found §136(a) susceptible of an interpretation which avoids the constitutional question. According to this argument, since the constitutional question can be avoided and hence the only question is one of statutory interpretation, the state courts—which have not yet interpreted §136(a)—should have the first opportunity to interpret their own statute. In support of this contention, Cahn relies on *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, 176 (1959), in which the Supreme Court observed that

> "no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them."

Cahn also argues that giving the state courts the first chance to interpret §136(a) would cause no irreparable harm to the plaintiffs since he has promised to refrain

from instituting prosecutions during the pendency of this case and would surely do the same if the district court applied the abstention doctrine and the plaintiffs promptly instituted an action in the state courts.

We reject these contentions as did all three judges below. The principle of abstention does not involve the abdication of federal jurisdiction, but only the postponement of its exercise. *Harrison* v. *N.A.A.C.P., supra,* at 177. However, in cases involving a challenge that the statute is on its face unconstitutional, the delay of state court proceedings might itself cause an impermissible chilling of the very constitutional rights which the plaintiff seeks to protect. *Zwickler* v. *Koota,* 398 U.S. 241 (1967); *Dombrowski* v. *Pfister,* 380 U.S. 479, 483-85 (1964). The Supreme Court has stated that "due respect" must be afforded a civil rights plaintiff's choice of forum for the vindication of his First Amendment rights, *Zwickler* v. *Koota, supra,* at 247-8; and we stated in *Holmes* v. *New York City Housing Authority,* 398 F.2d 262, 266 (2d Cir. 1968), that "[w]here a district judge chooses to exercise his equitable discretion in favor of retaining [a civil rights action], it will be unusual indeed when an appellate court refuses to uphold his discretion."

In the circumstances of this case, abstention could cause irreparable harm to the plaintiffs and to others similarly situated and could thus effectively nullify First Amendment rights. This danger is particularly grave since state proceedings often take many months before they are finished. Moreover, we were advised at oral argument that others are now being arrested frequently for various types of violations of §136(a) similar to those in the instant case or are being threatened with arrest for such violations. For example, counsel for the plaintiffs advised us at argument that they represent over sixty persons who have been

charged with displaying the emblem in question here, and that these prosecutions and District Attorney Cahn's threat have deterred many people from joining plaintiff organizations. Although Cahn has promised to refrain from prosecutions during the pendency of this litigation, his promise hardly affects prosecutions in parts of the state other than Nassau County. As Judge Moore observed in his opinion for the district court, "our citizens are entitled not to be threatened with prosecution because of a particular interpretation given to a somewhat ambiguous statute by a prosecutor whose views on public issues may differ from others." In view of these circumstances, there is no good reason why the federal courts should abstain in this §1983 civil rights suit until the state courts have resolved the questions. In the First Amendment area where many persons are constrained to withhold action until their rights are clarified, it is particularly desirable that judicial action be expeditious.

In any event, §136(a) cannot reasonably be interpreted to be inapplicable to the emblem in question here and thus to avoid the constitutional question.

The district court found that §136(a), while constitutional, does not apply to plaintiffs' emblem. We cannot agree with this finding. Despite Judge Moore's attempt to look at the purpose of the statute, the language of §136(a) clearly includes emblems such as those displayed by plaintiffs, as well as many others. Section 136(a) makes criminal the display of any flag, standard, color, shield, or ensign upon which shall have been placed any word, figure, mark, picture, design, or drawing; and the statute defines the words "flag, standard, color, shield or ensign" to include a picture or representation thereof upon which shall be shown the stars and stripes in any number or "by which

the person, seeing the same, without deliberation may believe the same to represent" the American flag or colors.

In our opinion anyone looking at the plaintiffs' emblems, with their red, white, and blue stars and stripes, must conclude immediately that they are representations of the flag. Although the courts should try, whenever possible, to construe statutes to avoid a constitutional infirmity, they may not, in doing so, rewrite the statute or do violence to its plain language. *Welsh* v. *United States,* 398 U.S. 333, 344-45 (1970) (Harlan, *J.*, concurring). Judge Moore's interpretation of §136(a) seems to us to be rewriting the plain language of the section. For this reason we must reach the constitutional question.

Plaintiffs' first argument in this regard is that §136(a) is unconstitutional on its face because it is overbroad and that it is overbroad because traditional First Amendment activity may be swept within its ambit. We agree. The Supreme Court has indicated on several occasions that if there is a reading of a penal statute which authorizes local law enforcement officers to prosecute traditional First Amendment activity, such a statute is unconstitutionally overbroad, despite the fact that the statute may also purport to proscribe activity not entitled to constitutional protection. E.g. *Cox* v. *Louisiana,* 379 U.S. 536 (1965); *Edward* v. *South Carolina,* 372 U.S. 229 (1963); *Winters* v. *New York,* 333 U.S. 507 (1948); *Baggett* v. *Bullett,* 377 U.S. 360, 371 (1964); *Keyishian* v. *Board of Regents,* 385 U.S. 589, 609 (1967). Section 136(a) falls in this category of overbroad statutes.

As plaintiffs argue, §136(a) prohibits in clear language a myriad of uses of the flag, including not only the displaying of the emblems which plaintiffs have been distributing, but also the displaying of flags or flag-type buttons

with patriotic slogans or pictures on them. It prohibits on its face all kinds of posters, buttons, symbols, slogans, and emblems such as have been used for many years in election campaigns, patriotic movements, and so forth.[2] Judge Moore recognized this problem when he wrote:

> The district attorney's broad reading of the subsection would make criminal the possession of all those reproductions of the face of President John F. Kennedy superimposed upon a picture of the American flag which hang on the walls of shops, homes and offices all over this country. And what of the millions of celluloid campaign buttons which for generations, including the time before this statute was enacted, have carried the photographs of the aspiring Presidential and other candidates against a background of one or more American flags in full color?

Thus the broad range of §136(a) would prohibit respectful and customary use of emblems, using the flag, or the signs and colors of the flag which are recognized as representations of the flag, although the emblems are used to espouse ideas—a communicative activity which is protected by the First Amendment. In *Street* v. *New York*, 394 U.S. 576 (1969), the Supreme Court held that verbal communication involving the flag is protected by the First Amendment, even if that verbal communication "casts contempt upon" the flag. The question in the instant case is whether nonverbal or visual communication involving the flag and flag alteration is similarly protected.

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2 As the Appendix to plaintiffs-Appellees' brief demonstrates, the American flag has been traditionally utilized as a campaign poster, a military recruiting poster, and an eye-catching backdrop for the effective transmission of ideas.

In *Stromberg* v. *California*, 283 U.S. 359 (1931), the Supreme Court held that display of a political emblem—there a red flag as a sign of opposition to organized government—is communicative activity protected by the First Amendment. The Court reaffirmed that position last year in *Tinker* v. *Des Moines*, 393 U.S. 503 (1969), where it held that nonverbal display of political emblems—such as arm bands—was "akin to pure speech" and was entitled to the same degree of constitutional protection. The many types of flag usage and flag alteration mentioned above and prohibited by §136(a) are a similar means of nonverbal political communication and hence come within the same rule. The use of the American flag throughout our history and in almost every political campaign as an aid in the dissemination of ideas demonstrates beyond any doubt the protected nature of such forms of expression.

Of course "symbolic speech" or visual communicative activity has been subjected to a greater degree of state control than has verbal communication. *United States* v. *O'Brien*, 391 U.S. 367 (1968); *Radich* v. *New York*, 26 N.Y. 2d 114 (1970), prob. jur. noted —— U.S. ——, 39 U.S.L.W. 3167 (October 19, 1970). The protection of such nonverbal communication is not absolute, but may be limited by a valid state interest. With respect to the flag uses described above, however, the state has no valid interest in prohibiting them. In *Street* v. *New York*, *supra*, Mr. Justice Harlan reviewed the state interests which a flag statute could conceivably serve. He listed

> "(1) an interest in deterring appellant from vocally inciting others to commit unlawful acts; (2) an interest in preventing appellant from uttering words so inflammatory that they would provoke others to retaliate physically against him, thereby causing a breach

> of the peace; (3) an interest in protecting the sensibilities of passers-by who might be shocked by appellant's words about the American flag; and (4) an interest in assuring that appellant, regardless of the impact of his words upon others, showed proper respect for our national emblem." 394 U.S. at 591.

Section 136(a) was not meant to prohibit incitement of onlookers to unlawful acts, a purpose which did motivate the enactment of the flag mutilation and defilement provisions of subsections (d) and (f). See *Radich* v. *New York*, 26 N.Y.2d 114, 124 (1970). Nor would subsection (a) withstand constitutional inquiry if construed as an attempt to proscribe expression having a tendency to provoke violent retaliation, for its proscription is not narrowly drawn to punish only that expression which would incite the average citizen to violent retaliation. See *Street* v. *New York, supra* at 592. Mr. Justice Harlan gave short shrift to the third possible state interest—that of protecting the sensibilities of passers-by—when he stated:

> "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."

Street v. *New York, supra*, at 592. Finally, after careful analysis of *West Virginia* v. *Barnette*, 319 U.S. 624 (1943) (ruling that compulsory flag salutes violate freedom of speech and religion), Mr. Justice Harlan dismissed the state's interest in ensuring proper respect for the integrity of the flag. Such an interest, while wholesome on its face, has no place in a free society when, as in §136(a), it in effect requires worship of the flag by compelling a series of

taboos concerning flag display. Thus, in the absence of any valid state interest in prohibiting them, the many flag uses and flag alterations which §136(a) proscribes are protected by the First Amendment and cannot constitutionally be forbidden. From this fact the overbreadth argument follows *a fortiori*.[3]

Similarly, §136(a) is unconstitutional as applied to the particular flag alteration engaged in by the plaintiffs here. Like the respectful and "patriotic" flag uses discussed above, plaintiffs' flag usage is a means of expressing their views on a vital political issue and hence is protected communicative activity unless there is a valid state interest in proscribing their emblem. But as shown above, the state has no such interest. Consequently, we conclude that §136 (a) violates the plaintiffs' First Amendment right to freedom of speech.

Plaintiffs also argue that §136(a) is unconstitutional on its face because it fails to provide enforcement officials adequate guidance concerning what is proscribed. We agree. Because of its overbreadth, the statute vests local law enforcement officers with too much arbitrary discretion in determining whether or not a certain emblem is grounds for prosecution. It permits only that expression which local officials will tolerate; for example, it permits local officials to prosecute peace demonstrators but to allow "patriotic" organizations and political candidates to go unprosecuted. This is apparently the kind of toleration the defendant has practiced. This opportunity for discriminatory selective enforcement, which §136(a) provides, renders the statute unconstitutional. *Cox* v. *Louisiana*, 379

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3 *Cf. Crosson* v. *Silver*, —— F. Supp. —— (D. Ariz. Nov. 13, 1970), in which a three-judge district court declared Arizona's flag desecration law unconstitutionally overbroad.

U.S. 536, 557 (1965); *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98 (1940).

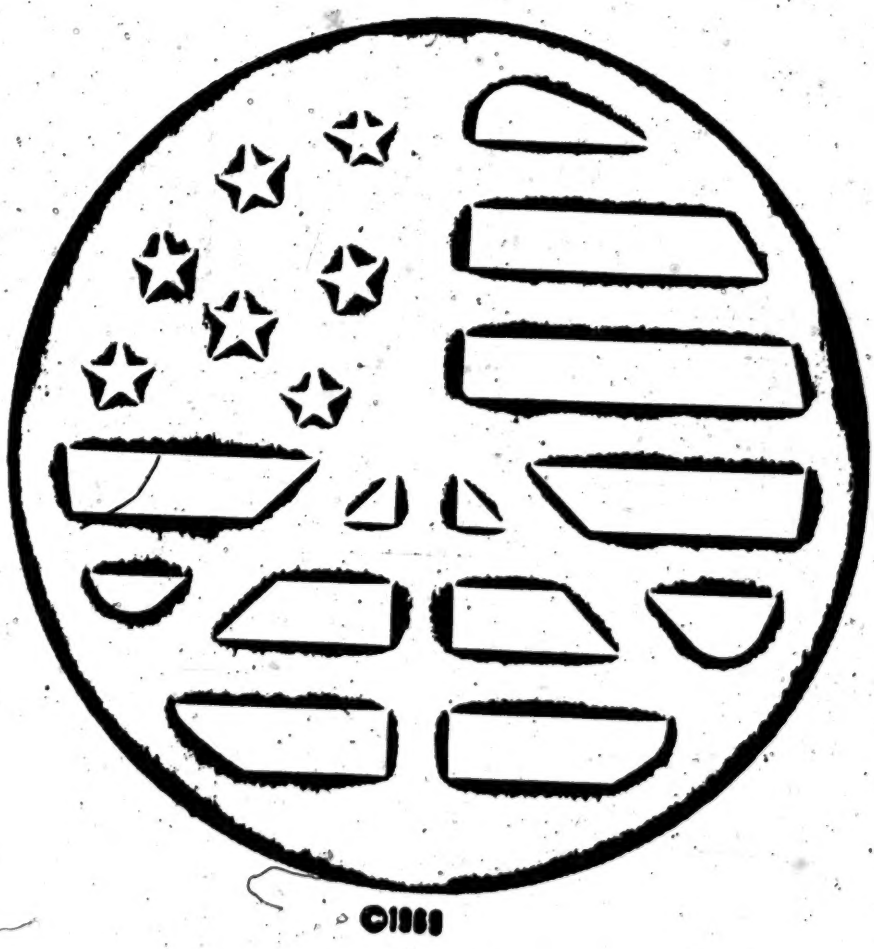
Finally, §136(a) is unconstitutional because it fails to afford adequate notice to the public of the scope of its proscription and is thus void for vagueness. As plaintiffs colorfully state in their brief on appeal:

> "Most persons react to Section 136(a) of New York's General Business Law in a manner similar to that of the Court below. They read the statute; painfully arrive at the plain, albeit convoluted, meaning of its words; and exclaim 'It can't possibly mean what it says.' They then attempt, as did the Court below, to arrive at some alternative meaning. Unfortunately, however, no two persons arrive at the same 'alternative meaning.' The net result is that no one knows what the statute means."

Absent knowledge of what the statute actually proscribes, a layman might refrain from conduct that is protected by the First Amendment for fear of coming too close to the line. Hence, the statute's failure to afford adequate notice of the scope of its proscription adds another constitutional infirmity. See *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939).

For these reasons, we affirm the judgment of the district court that the plaintiffs may not be criminally prosecuted for displaying their emblem, since we find that §136(a) of New York's General Business Law is unconstitutional.

APPENDIX



Opinion of the United States District Court

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

No. Civil 70-79 Tucson

SHARON CROSSON,

Plaintiff,

vs.

ROSE SILVER, County Attorney, Pima County, Arizona,

Defendant.

Before Ely, Circuit Judge, and Walsh and Craig, District Judges.

WALSH, D.J.

Plaintiff brought this action pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201-02 seeking declaratory relief and an injunction restraining defendant from further criminal proceedings against plaintiff under the Arizona flag desecration statute, A.R.S. § 41-793(C) (1956). This three-judge court was convened since the requests for relief meet the criteria of 28 U.S.C. §§ 2281 et seq. Our jurisdiction is founded on 28 U.S.C. § 1343(3) and (4).

From the statement of facts stipulated by counsel, it appears that on June 2, 1970, defendant filed in the Superior Court of the State of Arizona in and for the County

of Pima an amended information[1] charging that on or about May 6, 1970,

> Sharon K. Crosson did, by her act of burning a flag of the United States of America, wilfully, unlawfully, and publicly mutilate, deface, defile or cast contempt upon said flag, all in violation of A.R.S. § 41-793 C.

Section 41-793(C) reads in pertinent part:

> A person who publicly mutilates, defaces, defiles, tramples upon, or by word or act casts contempt upon a flag is guilty of a misdemeanor . . . .

Subsection (D) of Section 41-793 defines "flag" as including

> any flag, standard, color, ensign or shield, or any copy, picture or representation thereof, made of any substance or of any size, purporting to be the flag, standard, color, ensign or shield of the United States or of this state.

Plaintiff entered a plea of not guilty and moved to quash the information. This motion was denied.

At the trial,[2] defendant intends to prove that on May 6, 1970, on the University of Arizona campus, plaintiff publicly burned or aided and abetted the public burning of a United States flag, and that the burning was done with intent to cast contempt upon the flag. The contemptuous

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[1] The initial pleading by the state in Superior Court was a "direct" information filed May 19, 1970, charging that Mrs. Crosson "did knowingly and publicly mutilate, deface, defile, trample upon, or by word or act cast contempt upon a flag all in violation of A.R.S. § 41-793."

[2] Defendant has agreed to defer prosecution in the state court pending a decision by this court.

intent will be shown by testimony that concurrently with the burning plaintiff made remarks of a derogatory nature directed at the flag and the foreign policy of the United States with respect to the Southeast Asia military involvement. Defendant will not, however, seek a conviction on the basis of any of plaintiff's remarks but only for the act of flag burning.

In this court, plaintiff has moved for summary judgment asking that we declare A.R.S. § 41-793(C) violative of the First and Fourteenth Amendments. Specifically, plaintiff's attack charges the statute is overbroad in that it impermissibly infringes on protected expression and, further, it uses terminology so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.

Defendant has moved to dismiss or in the alternative asks this court to abstain from passing on the statute's constitutionality. Defendant argues that if the statute is not constitutionally perfect, its vices are minor and clearly within the reach of an acceptable limiting construction readily to be anticipated as a result of the state criminal prosecution.

For the reasons set out below, we find A.R.S. § 41-793(C) unconstitutional.

The controlling precedent on the issues before this court is *United States* v. *O'Brien,* 391 U.S. 367 (1968). Prior to analyzing these issues in light of the *O'Brien* formula, however, we must decide something *O'Brien* assumed, namely, whether the conduct drawn into question by the subject statute is conduct "so intertwined with expression" as to bring the First Amendment into play. See *Cowgill* v. *California,* 396 U.S. 371 (1970) (Harlan, J., concurring). Plain-

tiff asserts, and we agree, that her act of publicly burning the flag was symbolic speech.

While we need not here determine whether all conduct intended to express an idea is symbolic speech, we think it is self-evident that most, if not all, conduct associated with the United States flag is symbolic speech. Such conduct is normally engaged in with the intent to express some idea. Further, such conduct is invariably successful in communicating the idea. There is nothing equivocal about a flag-draped casket or a flag flying at half-mast at the death of a dignitary. Nor in this day and time is anyone likely to mistake the nature of the ideas expressed by a young person who desecrates his country's flag at an anti-war gathering.

There is, then, a recognizable expressive element in conduct prohibited by A.R.S. § 41-793(C). Accordingly, such conduct is prima facie protected by the First Amendment and the statute must be scrutinized to determine whether its regulation of the conduct is constitutionally permissible. The method of scrutiny is that directed by *O'Brien*.

In *O'Brien* the Court noted that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." 391 U.S. at 376. Whether the regulation in question properly effects the interest depends on whether

> it is within the constitutional power of the Government . . . it furthers an important or substantial governmental interest . . . the governmental interest is unrelated to the suppression of free expression . . . the incidental restriction on alleged First Amendment

freedoms is no greater than is essential to the furtherance of that interest. 391 U.S. at 377.

The only state power this court perceives as a constitutional basis for a penal statute of the type here involved is the police power. We specifically reject the existence of a constitutionally recognized state power to prohibit flag desecration based on an interest in preserving loyalty or patriotism. *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624 (1943). But cf., *United States* v. *Ferguson*, 302 F. Supp. 1111 (N.D. Cal. 1969). Whether the statute with which we are here concerned is a proper exercise of the police power necessitates an analysis of the statute to determine if it satisfies the last three *O'Brien* criteria.

Having decided that flag desecration can be symbolic speech, we must now determine what are the speech and nonspeech elements in such conduct in order to decide whether there is an important or substantial governmental interest in regulating the nonspeech element. The speech element is the readily recognizable expression of discontent with something the flag symbolizes. The nonspeech element in an act of flag desecration is the physical act of desecration.[3] What governmental interest, then, could there be in regulating this element?

When accomplished in public, this nonspeech element of flag desecration has a dual impact. The first impact is on the flag itself: it is mutilated, destroyed, or otherwise desecrated. The second impact is on the viewers: the emotions they experience, approval, disapproval, or even indifference, at the sight of the flag being desecrated. Since

[3] We use the term "desecration" in this opinion in its broadest sense; i.e., encompassing acts touching and not touching the flag, and acts more or less offensive.

these two "impacts" can fairly be characterized as part and parcel of the nonspeech element of public flag desecration, a statute prohibiting such behavior must be justified by virtue of a finding that there is a substantial or important governmental interest in preventing one or both "impacts."

We note the listing in *Street* v. *New York*, 394 U.S. 576, 591 (1969), of the possible governmental interests which could be furthered by a prohibition against casting contempt on the flag "by word." The characterization and disposition by *Street* of these interests is helpful, though not dispositive, since we are not prepared to say that there is no difference between the "impact" of pure speech on the listener and the "impact" on the viewer of the nonspeech element of symbolic speech. See Note, *Freedom of Speech and Symbolic Conduct: The Crime of Flag Desecration*, 12 Ariz. L. Rev. 72, 77 (1970).

We find that the State has no property interest in the flag sufficient to support a prohibition against the first "impact"; i.e., physical desecration of the flag. And we read *Street* as holding that the State cannot justify such a prohibition in order to insure that the potential desecrator shows proper respect for the flag. 394 U.S. at 593.

Insofar as the second "impact" is concerned, we must decide whether there is some governmental interest connected with the reactions of viewers of an act of flag desecration. We find nothing inherent in the act which stimulates those viewers who sympathize with the aims of the desecrator to engage in unlawful acts, such as rioting. Nor is the protection of the "sensibilities of passersby" the proper concern of the State. On neither score is there a substantial or important governmental interest furthered by a prohibition based on the second "impact."

This court cannot say, however, that the state legislature could not validly find that certain types of public flag desecration are so inherently inflammatory that in and of themselves they are likely to provoke the average person to retaliation and thereby cause a breach of the peace. *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942). Just as the flag is a symbol to the desecrator, representing perhaps oppression, hypocrisy, ill-conceived military ventures, or whatever, so is it a symbol to many Americans of a love as strong as love of self, that of love of country. We think it is within the realm of legislative judgment to find that some types of public flag desecration will be as provocative to many viewers as the kind of personal insult which is often followed by violence. That the state has a substantial interest in preventing the resulting breach of the peace and that the police power is the proper foundation for legislation directed toward that end is well settled doctrine.

It is also clear that in line with the third *O'Brien* criterion the state interest in preventing breaches of the peace is, in the flag desecration context, unrelated to the suppression of free expression. The interest is affected, not by the speech element of the conduct, but by the second "impact" of the nonspeech element. To more clearly differentiate, the symbolic expression of the idea originating in the mind of the desecrator does not carry the "impact" which per se causes the breach of the peace. Rather it is the previously described second "impact" of the nonspeech element which causes the breach and affects the state's interest. The state in order to further its interest may reach out to the cause of the breach and prohibit it. Since in this context the cause is not protected expression, it is clear that the state interest underlying the prohibition is not related to the suppression of free expression.

Thus far we have discussed in general terms a state's prohibition of public flag desecration. Having identified a power on which such a prohibition can be based and a state interest which could justify the exercise of the power, and having determined that interest to be unrelated to suppression of free expression, we must examine the statute in question here to determine whether its method of prohibiting public flag desecration places no greater burden on protected expression than is necessary to further the state's interest in preventing breaches of the peace. In other words, is A.R.S. § 41-793(C) drawn so as to include within its prohibition only those types of flag desecration which per se are likely to cause breaches of the peace or does it include non-provocative yet protected-because-symbolic types.

The statute first prohibits "publicly" desecrating the flag. Some such limitation is necessary if it is to be said the state is protecting against breaches of the peace. In this context, however, "publicly" would have to be construed to include only those situations where any member of the public could attend, specifically one who might react violently.

The remainder of the statute, however, is not susceptible to any limiting construction. On the contrary, its reach is altogether clear when it penalizes a person who publicly "mutilates, defaces, defiles, tramples upon, or by word or act casts contempt upon a flag . . . ."[4]

Assuming, but not deciding, that the terms mutilate, deface, defile, and trample upon are specific enough to connote only acts which when performed upon an actual

[4] We examine this statute as though the "by word" provision were not included. We consider this phrase already excised by *Street* v. *New York, supra.*

United States flag are likely to provoke retaliation from the average person, we cannot find that a prohibition of any "act [which] casts contempt" includes only acts the doing of which the legislature may validly prohibit. When the plain meaning of contempt is considered in light of the immense variety of conduct by which human beings express themselves, it becomes clear that acts casting contempt upon the flag could range from the obscene to the innocuous. While it may be true that some acts are more contemptuous than others, "contempt" is not itself a word of degree but is all-encompassing. It would describe such acts as sticking out one's tongue, turning one's thumbs downward, or raising a clenched fist salute. Rather than provoke the average person to retaliate violently, these acts would likely merit no more than a scornful glance.

The "contempt" portion of § 41-793(C) would prohibit the doing of all such acts. Yet these acts, which are clearly symbolic speech, do not affect the only legitimate state interest underlying such a prohibition. Even assuming there are acts of contempt which, when directed toward the flag, are inherently inflammatory, the prohibition against "acts [which] cast contempt" by its terms proscribes substantially more than is necessary to protect the state's interest; and that which is unnecessarily proscribed includes protected symbolic speech. Since we cannot see that any limiting construction short of excision can cure the defect,[5] this portion of § 41-793(C) must be struck down as uncontitutionally overbroad. *Thornhill* v. *Alabama,* 310 U.S. 88 (1940).

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[5] See *Harrison* v. *NAACP,* 360 U.S. 167 (1959). It will not suffice that the state may decline to prosecute relatively trivial acts of contempt. The hazard of prosecution and consequent chilling effect remains. *Baggett* v. *Bullitt,* 377 U.S. 360, 373 (1964).

It may be argued that the statute is disjunctive and thus severable, and that we should approve the "mutilate, deface, defile, or trample upon" portion. However, we find that these terms, when juxtaposed against the definition of "flag" in § 41-793(D), lose whatever susceptibility to a properly narrow application they may have had standing alone.

It is clear that when a person places on his automobile windshield a flag decal with a peace sign superimposed thereon, he has, in his effort at symbolically expressing his conception of what the flag should stand for, also "defaced" a "representation . . . purporting to be the flag . . . of the United States . . . ." Such an act violates § 41-793(C) and exposes the actor to criminal punishment. Yet we cannot conceive that such an act is likely to provoke the average citizen to angry retaliation.[6]

Thus, we must conclude that this portion of A.R.S. § 41-793(C) also prohibits protected acts of symbolic speech which do not affect the state's interest in preventing breaches of the peace. This being so, the only action we may take is to strike down the entire statute as unconstitutionally overbroad, *Thornhill* v. *Alabama,* supra; *Hodsdon* v. *Buckson,* 310 F. Supp. 528 (D. Del. 1970); Note, 83 Harv. L. Rev. 844, 853-55 (1970), leaving to the legisla-

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[6] In view of our limited finding that it is the sight of the flag being desecrated in certain ways that is likely to provoke retaliation, we must question the inclusion in § 41-793(D) of "standard, color, ensign or shield" as items which when desecrated are likely to provoke retaliation. We cannot say that conduct associated with these objects would, if communication is intended, necessarily constitute symbolic speech. By the same token, we cannot say that they are of such symbolic significance to the average person that a breach of the peace would likely result from their public desecration. We do not, however, pass on the question whether the state flag has such significance or whether the state might have some interest, property or other, in protecting its flag.

ture the enactment of a statute which properly protects the state's interest in preventing breaches of the peace.[7]

We decline to issue the injunction requested by plaintiff, without prejudice to her right to renew the request if need be. We do anticipate that the state through its officer, defendant here, will discontinue prosecution in light of our opinion. See *Hodsdon* v. *Buckson,* supra.

DATED: November 13, 1970.

(illegible) ELY
United States Circuit Judge

JAMES A. WALSH
United States District Judge

(illegible) CRAIG
United States District Judge

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[7] We would caution, however, that inclusion of a specific prohibition against desecration by burning might raise a question of specificity. "Burn", unlike, for example, "defile", does not describe an act which is invariably offensive and thus cannot have the same per se effect on which a "breach of the peace flag desecration prohibition" must be founded.

This does not mean that a public flag burner cannot be prosecuted under traditional breach of the peace statutes where, for example, the words accompanying the burning raise the entire act to the status of provocation.

Opinion of Supreme Court of the State of Washington

IN THE

SUPREME COURT

OF THE STATE OF WASHINGTON

No. 40096

EN BANC

Filed September 3, 1970

THE STATE OF WASHINGTON,

Respondent,

v.

FLOYD WAYNE TURNER, JR.,

Appellant.

Found guilty by a jury of violating the Uniform Flag Law (Laws of 1919, ch. 107, p. 259; RCW 9.86), defendant appeals the sentence of 6 months in jail and a $500 fine.

The statute then in effect declared:

> No person shall publicly mutilate, deface, defile, defy, trample upon or by word or act cast contempt upon any such flag, standard, color, ensign or shield.

Uniform Flag Law, RCW 9.86.030.[1]

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[1] In 1969, the legislature changed the flag law to read:

> No person shall knowingly cast contempt upon any flag, standard, color, ensign or shield, as defined in RCW 9.86.010,

The amended information charged that the defendant, on May 12, 1967:

> did willfully and unlawfully and directly and indirectly aid, abet, assist, counsel, encourage, advise and induce another to publicly mutilate, deface, defile and defy a flag of the United States of America, and publicly, by word or act cast contempt upon said flag by doing the following acts, to-wit: *holding a flag of the United States of America while another set fire to and destroyed said flag by burning.* (Italics ours.)

Defendant's arrest stemmed from a report to Seattle police by Mr. Louis C. Scott, a Seattle apartment house manager, who testified that about 6 p.m., May 12, 1967, some of his tenants complained about noise from across the street and wanted to know "what I was going to do about the noise out there." The noise, he said, came from the headquarters of what was known as CAMP, or Central Area Motivation Project. CAMP is an organization having to do with the social and economic rehabilitation of a large economically depressed area in Seattle's central district. From his apartment window, Mr. Scott had seen a number of people gradually assemble in the yard fronting the CAMP headquarters building. He said some carried baskets of what he thought was food, and others had musical instruments. He thought "the people who assembled there in large numbers dressed differently than normally." He heard music from inside the CAMP building and saw someone passing out yellow balloons to children in the yard.

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by publicly mutilating, defacing, defiling, burning, or trampling upon said flag, standard, color, ensign or shield.

Laws of 1969, 1st Ex. Ses., ch. 110, p. 823.
The enactment adds the word *knowingly*, eliminates the words *by word* and explicitly prohibits a public burning of the flag.

He noticed the defendant because, as he said, "he was the only person in the group who carried a flag."

About 10:30, a curious thing happened. He said:

> a red pickup truck came in and brought a piano, an upright piano, parked it right in front of my window, just a little bit south of it. And there several men came and unloaded it on the ground, carried it across the street to this CAMP Center, carried it up the stairs, up the first three steps there. Carried that piano up these steps and right up here on the sidewalk. Then they proceeded to knock that piano apart. Q. Did they use anything to do this? A. There appeared to be, I rather think from the way the men swung, possibly a couple of sledgehammers and probably axes, was what they used to knock the piano apart. Q. Was it completely knocked apart? A. Yes. Each time they hit the piano everyone would yell. The splinters were flying and it made quite a din there. Q. Did the defendant take part in the destruction of this piano? A. No, I didn't notice him doing that.

Noise from the piano smashing induced Mr. Scott to call the police again, and they arrived to observe the piano debris being loaded and hauled away. After that, Mr. Scott observed the event for which the defendant was charged. Looking through his binoculars, he saw the defendant hold an American flag while another individual set it afire:

> But after a little bit then the two men moved together and the defendant held the flag while this other gentleman lit it with a lighter and he held the flag until it burned. And when it got hot enough and the heat in-

tense enough, he dropped it. He pushed it away and it lit towards the other man's feet. Q. You mean the defendant dropped it? A. Yes.

Several Seattle police officers corroborated Mr. Scott's testimony in part, saying that they had seen Turner carrying an American flag that evening; other officers said that later in the week they had heard defendant say he had burned an American flag and would repeat the act at a later time.

Since the record does not show what was said before or after the flag burning, the defendant's actual intent, design or purpose in holding the flag while another set fire to it can only be inferred or guessed at.

Defendant, taking the stand in his defense, denied that he held a flag while another set fire to it; he denied that he participated in any way in a flag burning. He said he had been actively working in Seattle for several civil rights organizations which he described by their capitalized first letters as "CORE, NACP (sic) and SNICK." He was not, he said, a member of these organizations but sympathized with their aims and intended to help them. CORE, he said, meant Congress of Racial Equality, which stood for civil rights. He said the same about NAACP, National Association for the Advancement of Colored People. He was, he said, a helper of an organization whose purpose was to bring an end to war, called "The Committee to End the War in Vietnam," for which he had passed out leaflets and whose parade and demonstrations he had joined. He named a number of other groups and organizations which he had tried to help. He said he was a Dukhobor.[2] Interpreting some Russian writing on the back of his jacket which the

[2] A religious sect of Russian origin.

State's witnesses had referred to, defendant said it said "Dukhobor;" he explained that he had been raised a Dukhobor and had learned to speak Russian and Chinese because many of the Dukhobors do not speak English. He testified that he was present in the yard of the CAMP Center on May 12th.

He left the CAMP area with others, he said, in a pickup to get the piano. When he returned, he did notice that someone was carrying an American flag. He said he was not aware that anyone had burned a flag there until a friend later told him he had heard on the radio that someone by the name of Turner had been arrested for burning an American flag. That, he said, was the first he'd heard of the flag burning at the CAMP Center. He testified that he never had a flag in his hand at the gathering that night. On cross-examination, he said that, because policemen later followed him around and, as he expressed it, were harassing him, he mentioned that he might burn a flag but had never said he had burned one and was simply making conversation. Defendant estimated the crowd as consisting of approximately 50 people—25 in a circle in the yard and the remainder on the porch.

Defendant makes eight assignments of error, but we need discuss only one because it evokes the major and determinative issue of the appeal. The assignment arises from his exception to instruction No. 8 which said:

> You are instructed that it is not required that you find that the defendant intended to violate the law. You are only required to find that the defendant performed the physical act charged.

The question raised by the challenge to this instruction is whether intent to desecrate the flag, as distinguished from a mere intent to do the physical acts charged, is an element of the crime defined by the Uniform Flag Law,

RCW 9.86.030. If intent to defile, deface and mutilate the flag, or intent to cast contempt upon it by the commission of the acts charged, *i.e.*, publicly burning or aiding in the public burning, must be proved, then the conviction cannot stand. If, however, the flag statute as then in effect, RCW 9.86.030, belonged to that class of statutes defining crimes mala prohibita rather than mala in se, then the judgment should be affirmed. *Seattle* v. *Gordon,* 54 Wn.2d 516, 342 P.2d 604 (1959); *State* v. *Lindberg,* 125 Wash. 51, 215 P. 41 (1923).

Although the legislature and the state's political subdivisions under the police power may in some circumstances declare certain acts, conduct or omissions criminal without regard to the intent or knowledge of the actor, guilty knowledge will be deemed an essential ingredient if the defined crimes involve moral turpitude. 22 C.J.S. *Criminal* Law § 30 (1961). This distinction is seen in the innumerable ordinances, statutes and resolutions which define crimes mala prohibita. Legislation prohibiting offenses mala prohibita, if properly enacted within the police power, is usually upheld and conviction sustained without proof of evil intent or in some instances without proof even of an intent to violate them. Many penal laws, for example, relating to pure food and drugs, labeling, weights and measures, building, plumbing and electrical codes, fire protection, air and water pollution, sanitation, highway safety and numerous other areas, in the exercise of the police power may be phrased and enforced as laws mala prohibita and may require neither proof of intent to do a wrong nor knowledge that the wrong will be done.

But as we read the flag desecration statute applied either to a principal or to one who aids and abets in its violation, it does not define crimes mala prohibita but rather offenses

mala in se. In essence, to defile or hold up to contempt is conduct involving moral turpitude. Therefore, to sustain a conviction of desecrating the flag as defined by that statute, the acts must have been done knowingly and intentionally with an intent or purpose of defiling and desecrating it or holding it publicly up to contempt.

Our conclusion that the flag desecration statute under consideration, Uniform Flag Law, Laws of 1919, ch. 107, p. 259; RCW 9.86.030, was one defining crimes mala in se as distinguished from those mala prohibita, is, we think, supported in part by the absence of any provision in the statute that to be actionable the prohibited acts must be done with intention to or under circumstances tending to provoke public disturbance, disorder, breach of the peace or riot. The offense does not, therefore, include conduct amounting to provocation or incitement to or advocacy of crime, violence, riot or public disorder. *See Brandenburg* v. *Ohio,* 395 U.S. 444, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969). Nor does prosecution of defendant Turner in this case evoke the freedom of speech protection of the First Amendment, and the judicially sustained emergency limitation of that protection in circumstances of clear and present danger (*Schenck* v. *United States,* 249 U.S. 47, 63 L. Ed. 470, 39 S. Ct. 247 (1919); *Frohwerk* v. *United States,* 249 U.S. 204, 63 L. Ed. 561, 39 S. Ct. 249 (1919); *Debs* v. *United States,* 249 U.S. 211, 63 L. Ed. 566, 39 S. Ct. 252 (1919)), and the limitation upon the limitation which Mr. Justice Holmes said ought be applied to the clear and present danger doctrine. *See* dissent to *Abrams* v. *United States,* 250 U.S. 616, 624, 63 L. Ed. 1173, 40 S. Ct. 17 (1919). *Cf., Street* v. *New York,* 394 U.S. 576, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969), where the court reversed a New York flag desecration conviction because it could not ascertain from

the record whether the accused had been found guilty of what he said or of what he did.

The statute in question does, as we have noted, employ language implying that some evil intent or purpose must be shown. Words such as deface, defile, defy or cast contempt upon strongly imply that the described conduct shall be held criminally actionable only when the interdicted conduct is done with an evil design or purpose. If this were not so, the legislature could readily have said otherwise.

The idea that there must be an intent to desecrate and hold up to contempt is supported by an absence until quite recently of national legislation on the subject. In 1968, the Congress broadened the application of an existing District of Columbia statute into a national law. Public Law 90-381, § 1; 82 Stat. 291; 18 U.S.C. § 700 (1968). This statute, unlike that under inquiry here (RCW 9.86.030), makes it a criminal offense *knowingly* to cast contempt upon the flag either by publicly mutilating, defacing, defiling, burning or trampling upon it.[3]

Similarly, the recent flag desecration legislation in this state requires that one *knowingly* and publicly cast contempt upon the flag to be guilty. Laws of 1969, 1st Ex. Ses., ch. 110, p. 823; RCW 9.86.030, as amended (n. 1, *ante*, at 1). Thus, the legislature and the Congress in amendatory legislation supplied in words what we think was earlier implied in law—the requisite element of intent or purpose publicly to desecrate, defile and hold up to contempt and that the intent or purpose with which the acts are done is for the jury to determine.

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[3] "(a) Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than $1,000 or imprisoned for not more than one year, or both." 18 U.S.C., § 700(a) (1968).

That preservation of our democratic institutions and constitutional government does not depend upon reading out all elements of design, purpose and intent from the Uniform Flag Law may be seen in a history of the operation of the flag statute of modern Germany. The presence or absence of criminal intent seems to have had little effect one way or the other in the preservation of life and liberty and the pursuit of happiness in that country. Throughout all stages of its modern career, there was in effect in Germany a flag desecration statute. From an autocratic Imperial Germany under the Kaiser into the democratic Weimar Republic and thence into the unspeakably cruel and ruthless dictatorship of the Third Reich regime of Hitler, succeeded in turn by the military government of allied occupation and control, followed then by the present democratic Federal Republic of Germany—there was in the criminal code a flag desecration statute in force. *See* Appendix.

Accordingly, unless the statute expressly eliminates the element of intent or design or defines the kinds of offenses which, by their very nature, are classified judicially as mala prohibita, the ingredients of intent, design and purpose should be deemed indispensable to a proof of guilt. To hold otherwise, would make anyone criminally liable who accidentally burned or walked upon the flag in public or unintentionally or accidentally committed some other act toward it which, if intent were present, would clearly constitute a defacing or defilement or a holding up to contempt.

Accordingly, the accused should be allowed to show the jury that, whatever acts may have been proved against him, his purpose in committing the acts was neither to deface, nor to defile, nor to desecrate, nor to cast contempt upon the flag and that his want of such evil intentions would

be a defense to the charge. He should be permitted also to prove accident, mistake or fortuitous circumstances in defense. Thus, the defendant should have been allowed on his plea of not guilty to show to the jury that the holding of an American flag while another set fire to it was done, if done at all, without any intent to degrade, desecrate, defile or cast contempt upon it. Instruction No. 8, declaring to the exact contrary, that intent to violate the law was immaterial and that the defendant would be guilty if he performed the physical acts charged regardless of his intent or purpose, was, therefore, reversible error.

True, the intent with which acts are done frequently lies hidden in the mind of the actor and may be ascertained only from his conduct and its surrounding circumstances, but the accused's state of mind remains an issue of fact to be inferred by the jury where intent, purpose and design are elements of the crime charged. The state, to sustain a conviction, is obliged, we think, to prove that the burning of the flag in public, or the aiding or abetting of it, was done with an intent or design or purpose to defile, or defy, or cast contempt upon the flag and in the absence of such an intent, design or purpose the crime has not been shown.

The cause is, therefore, reversed and remanded for a new trial.

HALE, J.

WE CONCUR:

HUNTER, C. J.

FINLEY, J.

ROSELLINI, J.

HAMILTON, J.

NEILL, J.

McGOVERN, J.

APPENDIX

The Kaiser's flag desecration statute read:

> Any one who maliciously removes, destroys, injures, or commits insulting mischief on a public emblem of the authority of the Empire, or of a federal sovereign, or an emblem of the majesty of a federal state, shall be punished by a fine up to 600 shillings, or by imprisonment with labour up to two years.

G. Drage, Criminal Code of the German Empire § 135 (Novella of 1876), at 223 (1885). Another section in the German Criminal Code buttressed this one, making it a crime to commit insulting mischief on a public emblem or flag of a foreign state.

> Any one who maliciously takes away, destroys, injures, or commits insulting mischief on a public emblem of the authority of a state, which does not belong to the German Empire, or an emblem of the majesty of such a state, shall be punished by a fine up to 600 shillings, or by imprisonment with labour up to two years.

G. Drage, Criminal Code of the German Empire § 103 *a* (Novella of 1876), at 213 (1885).

One should not overlook the possible trespasses upon freedom of speech arising from the two statutes side by side. But even in autocratic Imperial Germany, unlike the statute at issue here, the law required that to be criminally actionable the acts be done with malice. Malice in Germany, circa 1871, one could assume to be the legal equivalent of malice in the United States, circa 1969, that is, acts

done with an ill will, or a design to effect an evil or unlawful purpose.

A 1932 amendment made substantial changes:

> Whoever publicly profanes (beschimpft) the Reich or one of the states incorporated into it, its constitution, colors or flag, or the German armed forces, or maliciously and with premeditation exposes them to contempt, shall be punished by imprisonment.

United States War Department Pamphlet No. 31-122, Military Government Information Guide, Statutory Criminal Law of Germany § 134*a*, at 95 (August, 1946) (enacted December 19, 1932; RGB1-I, 548). Significantly, this section is codified under "Profane Acts against the German Reich —*Beschimpfungen des Reiches und der Länder.*"

In 1935, after the Hitler regime established its dictatorship, the German flag desecration statute was, in a separate section, broadened to cover profanation of the swastika and other banners and symbols of the Nazi party in the following language:

> Whoever publicly profanes the German National Socialist Labor Party, its subdivisions, symbols, standards and banners, its insignia or decorations or maliciously and with premeditation exposes them to contempt shall be punished by imprisonment.
>
> The offense shall be prosecuted only upon order of the Reichsminister of Justice who shall issue such order in agreement with the Führer's deputy.

United States War Department Pamphlet No. 31-122, *supra*, at 96, as enacted June 28, 1935.

The Allied Control Council for Germany, which assumed governmental power as an act of occupation following the

defeat of the Third Reich in World War II, in Law No. 11 (Control Council for Germany, Law No. 11, Arts. 1 & 4, United States War Department Pamphlet No., 31-122, *supra*), repealed the section pertaining to the swastika and other Nazi symbols.

Time seems to have come full circle then, for in 1951, the Federal Republic of Germany, emerging from World War II and the apparent demise of Nazism, enacted section 96 as follows:

> 1. Anybody who publicly, in an assembly or by dissemination of writings, phonographic recordings, pictures or exhibits,
>
> (1) defames or maliciously vilifies the Federal Republic of Germany, one of her States, or the constitutional order,
>
> (2) urges or casts disparagement upon their colors, flags, coats-of-arms, or national anthems, shall be punished by imprisonment.
>
> 2. Equally punished shall be anybody who removes, destroys, injures or disfigures, or causes disparaging mischief to any publicly displayed national flag or any officially and publicly displayed insignia of sovereignty of the Federal Republic of Germany or one of her States. The attempt is punishable.
>
> 3. If the perpetrator has committed the deeds named in paras. 1 and 2 with the intent of furthering efforts designed to impair the existence of the Federal Republic or the constitutional principles designated in § 88, the punishment shall be imprisonment for a term of not less than three months. [8-30-1951].

G. Mueller and T. Buergenthal, German Penal Code of 1871 § 96, Defamation of the State, at 60 (1961).

SUPREME COURT, U. S.

FILED

MAY 18 1970

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 169

STEPHEN RADICH,

Appellant,

—v.—

PEOPLE OF THE STATE OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
The Statute	3
Questions Presented	3
Statement of the Case	4
How the Federal Questions Are Presented	5
The Questions Are Substantial	6
I. The First Amendment prohibits punishment of artistic expression on the ground that it has been found to be contemptuous of the flag	8
II. The only governmental interest furthered by the statute is respect for the flag which interest cannot be furthered without violating the First Amendment	11
III. New York's flag desecration statute is unconstitutional on its face because it is unclear, uncertain and overbroad in violation of the Fourteenth Amendment	14
IV. The equal protection clause of the Fourteenth Amendment bars the conviction of appellant for displaying sculpture in an art gallery under a statute which permits newspaper and magazine publishers to show photographs of that sculpture in their publications and permits exhibition of paintings on the same theme	18

PAGE

CONCLUSION 20

APPENDIX:

Majority Opinion of New York Court of Appeals .. 1a

Dissenting Opinion of Chief Judge Fuld 14a

Majority Opinion of Trial Court 19a

Dissenting Opinion of Judge Basel 25a

Opinion of Three-Judge Court in Hodsdon v. Buckson 31a

Order of Court of Appeals Below 45a

Statute Involved 48a

TABLE OF AUTHORITIES

Cases:

Bachellar v. Maryland, —— U.S. ——, 38 USLW 4316 (April 20, 1970) 13

Connally, Commissioner v. General Construction Company, 269 U.S. 385 (1926) 16

Cowgill v. California, —— U.S. ——, 38 USLW 3266 (Jan. 20, 1970) 6

Cox v. Louisiana, 379 U.S. 536 (1965) 13, 16

DeVeau v. Braisted, 363 U.S. 144 (1960) 2

Edwards v. South Carolina, 372 U.S. 229 (1963) 13

Frain v. Baron, 307 F. Supp. 27 (E.D.N.Y. 1969) 8

PAGE

Halter v. Nebraska, 205 U.S. 34 (1907) 8
Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966) 19
Hodsdon v. Buckson, —— F. Supp. —— (D. Del. March 18, 1970) 8, 10, 17

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) 14, 15

Kunz v. New York, 340 U.S. 290 (1951) 16

Lanzetta v. New Jersey, 306 U.S. 451 (1939) 15
Long Island Vietnam Moratorium Committee v. Cahn, —— F. Supp. —— (E.D.N.Y. 1970) 8, 18

NAACP v. Button, 371 U.S. 415 (1963) 15, 16

Roth v. United States, 354 U.S. 476 (1957) 8

Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) 2
Smith v. California, 361 U.S. 147 (1959) 15, 16
Staub v. City of Baxley, 355 U.S. 313 (1958) 16
Street v. New York, 394 U.S. 576 (1969) 2, 7, 8, 10, 12, 14
Stromberg v. California, 283 U.S. 359 (1931) 10, 11, 12

Terminiello v. Chicago, 337 U.S. 1 (1949) 13
Thornhill v. Alabama, 310 U.S. 88 (1940) 16, 17
Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) 9, 13

United States v. O'Brien, 391 U.S. 367 (1968) 13

PAGE

West Virginia v. Barnette, 319 U.S. 624 (1943) 8, 11, 14

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 19

Constitutional Provisions:

United States Constitution

First Amendment 3, 5, 6, 8, 10, 11, 16, 17, 18

Fourteenth Amendment 3, 5, 14, 15, 18

Statutes:

28 U.S.C. §1257 2

Penal Law of the State of New York

Section 1425(16)(d) 2, 3

General Business Law

Article 9B 12

Section 136 .....3, 12

Other Authorities:

Shikes, *The Indignant Eye: The Artist as Social Critic* (Boston, 1969, Introduction, p. xxiii) 9

Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970) 17

Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. of Pa. Law Rev. 67 (1960) 17

IN THE

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OCTOBER TERM, 1969

No. .....

STEPHEN RADICH,

Appellant,

—v.—

PEOPLE OF THE STATE OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant appeals from the final judgment of the Court of Appeals of the State of New York entered on February 18, 1970, affirming the judgment of the Appellate Term of the Supreme Court of the State of New York, First Department, dated June 13, 1968, affirming the judgment of conviction rendered in the Criminal Court of the City of New York, New York County, on May 5, 1967. Appellant submits this statement to show that this Court possesses jurisdiction and that substantial constitutional questions are presented.

Opinions Below

The opinion and judgment of the New York Court of Appeals was rendered on February 18, 1970, with Chief Judge Fuld and Judge Burke dissenting. The majority and dissenting opinions in the New York Court of Appeals have not yet been officially reported, and are set forth in the Appendix, *infra,* pp. 1a-18a. No written opinion or memorandum was handed down by the Appellate Term. The opinion of the Criminal Court of the City of New York, New York County, and the dissenting opinion of Judge Basel are reported at 53 Misc. 2d 717, 279 N.Y.S. 2d 680 (1967) and are set forth in the Appendix, *infra* at pp. 19a-30a.

Jurisdiction

This is an appeal from a conviction of violating Section 1425(16)(d) of the Penal Law of the State of New York. The judgment of the Court of Appeals of the State of New York was entered on February 18, 1970. Notice of Appeal was filed on May 7, 1970.

Jurisdiction in the Supreme Court to review the decision of the New York Court of Appeals by direct appeal is conferred by Title 28, United States Code, Section 1257 (2). The following decisions sustain the jurisdiction of this Court to review the judgment in this case on direct appeal: *Street* v. *New York,* 394 U.S. 576 (1969); *DeVeau* v. *Braisted,* 363 U.S. 144 (1960); *Schware* v. *Board of Bar Examiners,* 353 U.S. 232 (1957).

The Statute

The validity of the statute under which appellant was convicted, Section 1425 subdivision 16, d. of the Penal Code of New York, which is presently codified as Section 136 of the General Business Law, is questioned on this appeal. The statute is set forth in the Appendix at pp. 48a-49a.

Questions Presented

1. Does the First Amendment to the United States Constitution permit the punishment of artistic expression on the ground that it has been found to be contemptuous of our national symbol?

2. Does the statute under which appellant was convicted further any governmental interest other than fostering respect for the flag, and is the interest which is furthered by the statute unrelated to the suppression of free speech?

3. Is the prohibition against casting contempt upon the flag in the statute under which appellant was convicted sufficiently clear, certain and limited to meet the requirement of the Fourteenth Amendment that criminal activity be specifically defined?

4. Does the equal protection clause of the Fourteenth Amendment bar the conviction of appellant for displaying sculpture in an art gallery under a statute which permits magazine and newspaper publishers to show photographs of that sculpture in their publications and permits exhibition of paintings on the same theme?

Statement of the Case

Appellant, Stephen Radich, is the proprietor of an art gallery. The gist of the crime for which he was convicted was that he displayed certain sculptures, called constructions, in his art gallery, which had been created by an artist named Marc Morrel and which utilized the American flag or what appeared to be the American flag (R. 5).*

Appellant was served with a summons in his gallery by a police officer (R. 10). At the trial, the complaining police officer testified that from the street he had observed one of the sculptures in the window of the second floor gallery (R. 9); that he had seen that sculpture and others when he entered the gallery with a police photographer who photographed the works (R. 11-16) (the photographs were introduced into evidence at People's Exhibits 1-9); that appellant and one other person were present (R. 16); and that anti-war music was being played (R. 125). There was no testimony of disturbance or disorder or circumstances which might lead to disorder (R. 17).

Two witnesses, appellant (R. 69-102) and the Art News Editor of the New York Times, Mr. Hilton Kramer (R. 107-130) testified for the defense. As experts in the art field (R. 71, 107-110), they stated their opinion that contemporary artists use many unconventional materials and frequently mix materials, so that there is today no distinct line between sculpture and painting (R. 72–R. 112-113); and that the sculptures or constructions were art (R. 67, 113)—a form of protest art in the tradition followed by

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* All citations are to the certified copy of the Record which has been filed with the Court.

Goya, Michelangelo and Picasso (R. 78-79). Appellant also testified that he did not intend to express contempt for the flag by exhibiting the sculpture (R. 80).

How the Federal Questions Are Presented

The Federal questions sought to be reviewed in this Court were raised at trial in the Criminal Court of the City of New York by motion to dismiss the complaint at the close of the People's case. Appellant's grounds for dismissal included his contention that the statute unconstitutionally denied defendant equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution in that pictures, newspapers, books and magazines were excepted from its prohibitions (R. 39-40); that it violated the First Amendment's guaranty of free speech which protects sculpture as well as words (R. 40-44); and that the statute is unconstitutionally vague (R. 45-46).

The Court passed on those constitutional questions in finding appellant guilty of the charge, stating specifically that the statute did not violate the equal protection clause of the Fourteenth Amendment (R. 147), or the freedom of speech guarantee of the First Amendment (R. 148-149); that the statute was not so vague as to violate the due process clause of the Fourteenth Amendment (R. 150); and that no intent to violate the statute was required (R. 150).

The constitutional questions were raised on appeal to the Appellate Term and to the Court of Appeals of the State of New York. The Court of Appeals opinion commences by stating that the issue on appeal is "whether defendant's conviction of a violation of New York's flag desecration statute was in contravention of his right of free speech

under the First Amendment to the Constitution of the United States."

Stating that "the constitutional question in respect of the proscribed defilement by an 'act' rather than by 'words' was expressly left open in *Street* v. *New York* (394 U.S. 576, 594)." (App. p. 1a), the majority opinion concluded that appellant communicated "ideas by conduct" in a form which threatened public safety and therefore his conviction did not infringe the First Amendment (App. p. 4a).

Appellant's other constitutional objections were specifically rejected: "The statute is not unconstitutionally vague" (App. p. 12a); "even if we assume defendant had an honest political intent . . . or that he had no intent at all, that element is not essential to a conviction of violating a statute which is *malum prohibitum*" (App. p. 12a); "No less tenuous is appellant's claim of denial of equal protection . . ." (App. p. 12a).

The Questions Are Substantial

Concurring in the dismissal of the appeal in *Cowgill* v. *California*, —— U.S. ——, 38 USLW 3266 (Jan. 20, 1970), Mr. Justice Harlan stated:

> ". . . the issue tendered by appellant—whether symbolic expression by displaying a 'mutilated' American flag is protected from punishment by the Fourteenth Amendment—is one that I cannot regard as insubstantial. See *Street* v. *New York*, 394 U.S. 576, 594."

Mr. Justice Harlan concurred in the dismissal of Cowgill's appeal because the record did "not adequately flush the narrower and predicate issue of whether there is a

recognizable communicative aspect to appellant's conduct which appears to have consisted merely of wearing a vest fashioned out of a cut-up American flag."

The communicative aspect of appellant's "conduct" in this case was recognized in the opinion of the Court of Appeals affirming his conviction. Appellant was convicted for exhibiting in an art gallery "certain 'constructions,' comparable to sculptures, which had been fashioned by an artist as expression of protest against the Vietnam war and which, in each case, prominently incorporated the American flag" (App. p. 2a).

The dissenting opinion viewed the sculpture exhibited by appellant as pure expression, equal to words in its claim to First Amendment protection: ". . . the State may not legitimately punish that which would be constitutionally protected if spoken or drawn simply because the idea has been expressed, instead, through the medium of sculpture" (App. p. 16a).

If the dissenters' view is accepted by this Court, its decision in *Street* v. *New York, supra*, requires summary reversal of appellant's conviction. Since appellant believes that no meaningful distinction may be drawn, in a constitutional sense, between verbal speech and protest sculpture involving the flag, such a summary reversal would not be inappropriate. In any event, the record in this case is suitable to bring the question considered substantial by Justices Harlan and Stewart before this Court in a context of major importance to artists and those concerned with artistic expression.*

* In that regard, the Museum of Modern Art and the New York State Council on the Arts have requested counsel to inform the

This case is a continuation of a series of judicial explorations into the constitutional implications of state statutes prohibiting uses of the flag which are considered to be contemptuous, defiant or defiling. E.g., *Street* v. *New York,* 394 U.S. 576 (1969); *Hodsdon* v. *Buckson,* —— F. Supp. —— (D.Del. March 18, 1970) Appendix, *infra* at pp. 31a-44a; *Long Island Vietnam Moratorium Committee* v. *Cahn,* currently pending (E.D.N.Y. 1970); *Frain* v. *Baron,* 307 F. Supp. 27 (E.D.N.Y. 1969); *Halter* v. *Nebraska,* 205 U.S. 34 (1907). In each case, the basic dilemma has been the extent to which a free society may compel respect for its flag.

In a free society no person may be compelled to perform obeisance to a symbol of the state, by being forced to salute it, *West Virginia* v. *Barnette,* 319 U.S. 624 (1943); or, by being forced to treat it as though it were a sacred totem. *Hodsdon* v. *Buckson, supra* (App. p. 31a).

I.

The First Amendment prohibits punishment of artistic expression on the ground that it has been found to be contemptuous of the flag.

A work of art, whether it be a poem, a novel, a play, a painting, a cartoon drawing or a piece of sculpture is a form of expression protected by the First Amendment. *Roth* v. *United States,* 354 U.S. 476, 487 (1957). Two and three dimensional art forms have, throughout history, ex-

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Court that, should jurisdiction of this appeal be accepted, they plan to file briefs *amici curiae* with the Court seeking reversal of the conviction.

pressed political ideas. Artists have traditionally raised their "voices" in social protest:

> "They have used the most effective weapon at their command—their art—to needle the Establishment, duel with oppressive governments, satirize corrupt or indifferent churches, strip bare the foul futility of war, attack exploitation, uncover the bleak existence of the poor, and in general to make visual comment on human folly in its infinite variations." Shikes, *The Indignant Eye: The Artist as Social Critic* (Boston, 1969, Introduction, p. xxiii).

Nevertheless, the Court of Appeals of the State of New York has affirmed appellant's conviction for publicly expressing opinions by means of flag sculpture on the ground that the art work invited its audience "to join in the protest, or in counterprotest, with the consequent potential of public disorder" (App. p. 5a).

As this Court stated in *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969), in holding unconstitutional a ban against black armbands worn as an expression of opposition to the Vietnam War:

> ". . . in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken . . . that deviates from the view of another may start an argument or cause a disturbance. But our Constitution says we must take this risk. *Terminiello* v. *Chicago*, 337 U.S. 1 (1949)." 393 U.S. at 508.

No exception to the Constitutional mandate may be, or has been, made where the flag is the symbol utilized. In *Street* v. *New York,* 394 U.S. 576 (1969), this Court ruled that contemptuous language directed at the flag could not constitutionally be made the basis for criminal punishment. Mr. Justice Harlan, writing for the Court, stated:

> "We have no doubt that the constitutionally guaranteed 'freedom to be intellectually . . . diverse and even contrary' and the 'right to differ as to things that touch the heart of the existing order' encompass the freedom to express publicly one's opinions about the flag, including those opinions which are defiant or contemptuous." *Id.* at 592-593.

In so holding, the Court was merely reaffirming the doctrine, enunciated in *Stromberg* v. *California,* 283 U.S. 359 (1931), that the display of flags and banners is fully protected by the First Amendment.

In *Hodsdon* v. *Buckson,* —— F. Supp. —— (D. Del. March 18, 1970), reproduced *infra* at Appendix, pp. 31a-44a, a three judge United States District Court repudiated the concept that non-verbal communicative activity involving the flag was not entitled to the plenary protection of the First Amendment. Judge Seitz, writing for the Court, stated:

> "The crucial issue, therefore, is whether, although the state may not . . . punish words defiant or contemptuous of the flag, it may nevertheless punish acts which convey identical ideas.
>
> "Expression is not confined to the spoken and written word. A court may take judicial notice of the symbolic significance of particular acts . . . . Thus, although

acts are not beyond regulation because they have symbolic components, in the absence of factors justifying limitation, symbolic speech is constitutionally protected" (App. 37a-38a).

The Delaware District Court, rejecting the notion that the state interest in preventing breaches of the peace justified Delaware's flag statute (which is identical in all material respects to the New York statute at issue herein), declared the statute unconstitutionally overbroad.

II.

The only governmental interest furthered by the statute is respect for the flag which interest cannot be furthered without violating the First Amendment.

In *Board of Education* v. *Barnette*, 319 U.S. 624 (1943), this Court held that the state could not compel respect for the flag.

The Court below attempted to distinguish this case from *Barnette* and from *Stromberg* v. *California*, 283 U.S. 359 (1931):

"However, the statutes prohibiting certain kinds of exhibition of foreign flags, and statutes requiring the salute to our flag (Cf. *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624) are clearly designed for no other purpose than communicative suppression whereas a flag desecration statute is aimed at keeping the peace. While it is true that violations of the flag desecration statute will probably not occur apart from the expression of an idea, the prime reason for the statute was not to insure suppression of such ideas, but

rather to insure preservation of the public peace" (App. 11a).

There is nothing in the statute to support that distinction; the statute in *Stromberg* could have been justified on the same ground. New York's flag desecration statute is not phrased, and has not been construed, to require a finding of public disturbance, or an imminent breach of the peace.[1]

If preserving the public peace was the primary objective in prosecuting appellant, he could have been charged under New York's disorderly conduct statute. However, a conviction under that statute would not have been sustained. The exhibition in question occurred in the quiet surroundings of a second floor art gallery in midtown Manhattan. It is difficult to conceive of a forum within which the expression of ideas would be less likely to lead to a breach of the peace. As Chief Judge Fuld stated:[2]

> ". . . I do not understand how it may reasonably be said that the mere display of Morrel's constructions in an art gallery, distasteful though they may be, poses the type of threat to public order necessary to render such an act criminal. This prosecution, in my view, is nothing more than political censorship falling far out-

[1] The statute under which appellant was convicted was entitled "Malicious Injury to and Destruction of Property"; it is now codified under Article 9B of the General Business Law entitled "Uses of Names and Symbols" as Section 136 "Exhibition or Display of the Flag." The codifiers have apparently not recognized it to be a disorderly conduct statute.

[2] It is interesting to note that the dissent in the Court of Appeals was written by Chief Judge Fuld, who wrote for that court in upholding the conviction in *Street*.

> side our holding in *People* v. *Street*, and may not be constitutionally sustained." —— N.Y.2d —— (App. p. 18a).

To deny, as has the Court below, plenary constitutional protection to protest art because its subject is the flag is to narrow the protection of the First Amendment to those ideas approved by the majority. A potentially hostile audience cannot serve to change the expression of ideas to criminal conduct. *Tinker* v. *Des Moines, supra; Terminiello* v. *Chicago*, 337 U.S. 1 (1949); *Edwards* v. *South Carolina*, 372 U.S. 229 (1963); *Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Bachellar* v. *Maryland*, —— U.S. ——, 38 U.S.L.W. 4316, 4317 (April 20, 1970).

The rationalization of the Court of Appeals below finds no support in *United States* v. *O'Brien*, 391 U.S. 367 (1968). The governmental interest furthered by the statute prohibiting draft card burning was held to be preservation of draft cards to facilitate administration of the draft. The same kind of analysis of the flag desecration statute would show that the governmental interest furthered by the flag desecration statute is only respect for the flag.

Appellant was convicted because he "cast contempt" on the flag. The statute does not forbid the exhibition of sculpture; it forbids the message communicated by that sculpture. Casting contempt is, by definition, expressing an opinion, and casting contempt on the flag involves invariably, the expression of a political opinion.

Has the state a valid interest in punishing contempt for the flag? New York's statute, as applied by the court below, protects no state interest other than compelling veneration for the flag. Respect for the flag cannot be

compelled in a free society. *West Virginia* v. *Barnett,* 319 U.S. 624 (1943); *Street* v. *New York,* 394 U.S. 576 (1969).

III.

New York's flag desecration statute is unconstitutional on its face because it is unclear, uncertain and overbroad in violation of the Fourteenth Amendment.

Appellant has been found guilty under a statute which makes it a crime to "cast contempt" upon the flag. This standard for criminality is entirely inadequate to meet the constitutional requirements which have been established by this Court.

In *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495 (1952), a ban on "sacrilegious" motion pictures was approved by the New York Court of Appeals. In reversing, this Court said:

> "New York's highest court says there is 'nothing mysterious' about the statutory provision applied in this case: 'It is simply this: that no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule. . . . ' This is far from the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society. In seeking to apply the broad and all-inclusive definition of 'sacrilegious' given by the New York courts, the censor is set adrift upon a boundless sea and a myriad of conflicting currents of religious views . . . " 343 U.S. at 504-505.

The criterion established by the statute in *Burstyn* was whether a religious theme was treated in such a manner as to offend the religious beliefs of any group of persons. The criterion established by the flag desecration statute—whether a political symbol is treated in such a manner as to offend the political beliefs of any group or person—is equally vague and offensive under our Constitution.

Governmental regulations which fail to apprise the public of the scope of their proscriptions violate the Fourteenth Amendment, e.g., *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939). The uncertainty inherent in the statute under which appellant was convicted is particularly disturbing because it affects communication. The decision of the trial court below illustrates the danger in permitting such imprecise statutes. The majority opinion states:

> "If he [the defendant] wishes to approach the brink of what is proscribed he necessarily gambles on an adverse finding by the court." 279 N.Y.S. 2d at 685.

However, it is entirely contrary to the holdings of this Court to require a person to "gamble" on whether a particular form of expression is or is not permitted. To require such a "gamble" inevitably inhibits free expression. E.g., *Smith* v. *California*, 361 U.S. 147 (1959) at 151; *NAACP* v. *Button*, 371 U.S. 415 (1963), at 432-433.

As applied in this case, the chilling effect upon the free dissemination of ideas of the vague statutory language is enhanced by the fact that the statute has been construed to require no finding of appellant's intent to cast contempt upon the flag.

Appellant testified that he did not intend to cast contempt upon the flag by exhibiting the sculpture (R. 80), and that in fact he thought the artist might be expressing, not contempt for the flag, but contempt for those who were using the flag for aggressive purposes. The trial court held no intent to violate the statute was required for conviction (R. 150). The Court of Appeals specifically affirmed that holding: " . . . but even if we assume that defendant had an honest political intent in exhibiting these constructions, or that he had no intent at all, that element is not essential to a conviction of violating a statute which is *malum prohibitum*" (App. p. 12a).

Intent is a necessary element for a conviction in all cases involving the First Amendment. *Smith* v. *California,* 361 U.S. 147 (1959).

A basic policy underlying the "void for vagueness" doctrine is that no governmental regulation, especially in the First Amendment area, may vest an official with discretion to determine whether or not given conduct falls within its purview. E.g., *Connally, Commissioner* v. *General Construction Company,* 269 U.S. 385 (1926); *Cox* v. *Louisiana,* 379 U.S. 536 (1965). Such a policy is designed to protect against arbitrary and unequal enforcement of penal statutes in the sensitive area protected by the First Amendment. *Cox* v. *Louisiana,* 379 U.S. 536 (1965) at 557. *Thornhill* v. *Alabama,* 310 U.S. 88 (1940) at 97-98; *Kunz* v. *New York,* 340 U.S. 290 (1951); *Staub* v. *City of Baxley,* 355 U.S. 313 (1958); *NAACP* v. *Button,* 371 U.S. 415 (1963) at 433.

The recent history of New York's flag desecration statute bears painful witness to the wisdom of the rule enunci-

ated in *Thornhill*. Unfortunately, it appears that the flag veneration statute has been enforced with particular vigor against persons expressing dissenting views. Despite the widespread use of the flag in commercial contexts and in connection with orthodox political activity, counsel are aware of no prosecution for such activity.[3]

This Court has consistently refused to uphold a penal statute when conduct protected by the First Amendment may be deemed by local law enforcement officials to fall within the terms of its proscription. Note, *The First Amendment Overbreadth Doctrine,* 83 Harv. L. Rev. 844 (1970); Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. of Pa. Law Rev. 67 (1960). Such overbroad statutes have been held to violate the constitution because they invite local law enforcement officials to suppress constitutionally protected conduct in the mistaken belief that such conduct is prohibited by the statute in question.

As the Court pointed out in *Hodsdon* v. *Buckson,* —— F. Supp. —— (D. Del. 1970), the Delaware statute which is

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[3] The following incidents reveal that the capacity for abuse inherent in New York's vague flag desecration statute has not been ignored.

In Claverack, New York, a young man was arrested for driving a red, white and blue Volkswagen (he also has a brown beard). *People* v. *Pregaskis,* currently pending in Claverack Justice of the Peace Court.

In Happaugue, New York, a young housewife was arrested and held on $500 bail for flying her American flag upside down to protest the Vietnam War. The Nassau County District Attorney is appealing from the dismissal of her case. *People* v. *Hubner,* Nassau District Court. No action was taken, however, when the neighboring Rockville Centre American Legion flew its American flag upside down to protest government inaction concerning the Pueblo incident. *Newsday,* February 5, 1968, p. 15.

The District Attorney of Nassau County has threatened to arrest any person found displaying the emblem of Women Strike for

identical to the New York statute at issue herein, is capable of application to an infinite variety of expressive "conduct," ranging from flag burning to flying one's flag at half mast to unorthodox gestures aimed at the flag. The existence of so broad a proscription impinges upon areas which are protected by the First Amendment and therefore renders the statute unconstitutional.

IV.

The equal protection clause of the Fourteenth Amendment bars the conviction of appellant for displaying sculpture in an art gallery under a statute which permits newspaper and magazine publishers to show photographs of that sculpture in their publications and permits exhibition of paintings on the same theme.

The statute under which appellant was convicted provides that it shall not apply to "an ornamental picture . . . or newspaper, or periodical. . . . "

Photographs of the sculpture exhibited by appellant were printed in Life Magazine (R. 82) without fear of prosecution. There is no conceivable rationale for permitting photographs of sculpture to be published in newspapers

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Peace in Nassau County. The emblem consists of a representation of the American flag with a peace symbol superimposed therein. *Long Island Vietnam Moratorium Committee* v. *Cahn*, currently pending E.D.N.Y.

Counsel herein represent at least five persons who have already been arrested in New York City for displaying the Women Strike for Peace emblem.

Appellant is not offended by the use of the flag by patriotic groups, or, even in a commercial context. He is offended, however, that New York State's law enforcement apparatus enforces the statute with particular severity against political dissenters.

and photographs and prohibiting an exhibition of the sculpture itself.

The equal protection clause of the Fourteenth Amendment forbids the State from arbitrarily discriminating between different classes of persons. Classification is permitted only when it is founded upon a rational policy, *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663 (1966); *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886).

It is difficult to imagine a sound justification for applying the statute to a person who exhibits sculpture, the appellant in the instant case, and not to one who publishes pictures of that sculpture or who exhibits paintings with the same theme. There can be no legitimate reason to permit in a periodical a use of the flag which is prohibited in a sculpture exhibit. The statute, therefore, engages in invidious discrimination between similar groups —artists who paint and those who sculpt, art gallery proprietors who exhibit paintings or photographs and those who exhibit sculptures and magazine and newspaper publishers and art gallery proprietors—and violates the equal protection clause of the United States Constitution.

CONCLUSION

For the reasons stated above the decision of the New York Court of Appeals should be summarily reversed, or, in the alternative, jurisdiction over the appeal herein should be noted.

Respectfully submitted,

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APPENDIX

Majority Opinion of New York Court of Appeals

STATE OF NEW YORK

COURT OF APPEALS

App. T. 1. No. 368. 69

THE PEOPLE &c.,

Respondent,

—v.—

STEPHEN RADICH,

Appellant.

OPINION

UNREVISED AND UNCORRECTED. NOT FOR PUBLICATION.

GIBSON, J.:

The issue is whether defendant's conviction of a violation of New York's flag desecration statute was in contravention of his right of free speech under the First Amendment to the Constitution of the United States. The particular penal provision found to have been violated provides, in substance, that any person who shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon the flag of the United States of America, either by words or act, shall be guilty of a misdemeanor (former Penal Law, §1425, sub. 16, par. d, now General Business Law, §136, subd. d). The constitutional question in respect of the proscribed defilement by an "act," rather than by "words," was expressly left open in *Street* v. *New York* (394 U.S. 576, 594), which reversed our af-

firmance of a conviction under this same statute (*People* v. *Street*, 20 N.Y.2d 231). We have concluded that the conviction in the case now before us infringed no constitutional guarantee.

The defendant, the proprietor of an art gallery in the City of New York, publicly displayed and exposed for sale, certain "constructions," comparable to sculptures, which had been fashioned by an artist as expressive of protest against the Vietnam war and which, in each case, prominently incorporated the American flag.

The complaint, upon which defendant was charged and convicted, alleged, among other violations of the statute, that defendant publicly displayed the flag of the United States of America in the form of the male sexual organ, erect and protruding from the upright member of a cross; also, in the form of a human body, hanging from a yellow noose; and, again, wrapped around a bundle resting upon a two-wheeled vehicle, shown by photographs in evidence to resemble a gun caisson.[1]

For the purposes of this opinion it seems necessary to discuss only the first of the constructions complained of. Testifying in his own behalf, the defendant said that this was protest art; and that during the exhibition of the

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[1] The allegations, in full, were that "the defendant did have on public display and for public viewing, the flag of the United States of America, in the following manner; 1—in the form of a male sexual organ, protruding from the body of form, in the anterior portion of the body of the form and depicting the erected male penis, protruding from a form of a cross. 2—the flag of the United States of America, wrapped in a chained bundle. 3—The standard of the United States on the form of an alleged elephant. 4—The Union of the flag of the United States of America, depicted in the form of an octupus [*sic*]. 5—The American flag attached to a gas meter. 6—The American flag wrapped around a bundle attached to a two wheeled vehicle. 7—The American flag in the form of a body, hanging from a yellow noose."

constructions, background music, consisting of war protest songs, was played from a tape. Asked, on cross-examination, as to the use of the flag for the purpose of protest, he said that the object extending from the vertical member of the cross and wrapped in a small flag was representative of a human penis; that tassels at the base of this protrusion represented "probably * * * decorative or pubic hair, depending on what one decides it looks like to him."[2] Asked as to the particular expression and protest intended to be conveyed, the witness said that perhaps the penis represents the sexual act, which by some standards is considered an aggressive act; that organized religion is also symbolized by the figure, which seems to suggest that organized religion is supporting the aggressive acts suggested.

Only recently this court had occasion to give extended consideration to section 1425 of the former Penal Law and specifically to paragraph d thereof. In *People* v. *Street* (20 N.Y.2d 231, revd. 394 U.S. 576, *supra*) we affirmed the conviction of a defendant who, upon hearing of the shooting of the civil rights leader James Meredith, took an American flag to a street corner, burned it, saying, "We don't need no damned flag," and made other statements to people who gathered to watch these actions, one of these being the arresting policeman, to whom defendant said: "If they let that happen to Meredith, we don't need an American flag." The crux of the defense was that defendant's acts and speech were proper forms of protest legitimized by the First Amendment. Synopsizing

[2] The "construction" was described in the majority opinion of the Criminal Court as "in the form of a large cross with a bishop's mitre on the headpiece, the arms wrapped in ecclesiastical flags and an erect penis wrapped in an American flag protruding from the vertical standard."

Chief Judge Fuld's opinion upholding the conviction, we find the position of the court to be this: While nonverbal expression may be a form of speech within the protection of the First and Fourteenth Amendments, the same kind of freedom is not afforded to those who communicate ideas by conduct as to those who communicate ideas by pure speech; that the State may legitimately proscribe many forms of conduct and no exception is made for activities to which some would ascribe symbolic significance; that, in sum, the cases show that the constitutional guarantee of free speech covers the substance rather than the form of communication, but that if the substance is being conveyed by a form violative of the public health, safety or well-being, then the First Amendment protection is subordinated to the general public interest. With regard specifically to the flag desecration statute it was squarely held that it was a valid statute in that, regardless of the major motivating factor behind its enactment, there was a clear legislative purpose to prevent a breach of the peace; that the Supreme Court long ago in *Halter* v. *Nebraska* (205 U.S. 34, 41) stated: "[I]nsults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot." This court said that our statute was designed to prevent the outbreak of such violence by discouraging contemptuous and insulting treatment of the flag in public.

The Chief Judge's opinion then noted that concededly defendant's acts arose out of indignation and a sense of outrage; that the act was one of incitement and as such threatened the public peace, a result which the State is legitimately interested in preventing. With regard to Street's purpose—to express indignation and protest—the

parallel to the case before us is clear. Here, the expression, if less dramatic, was given far wider public circulation and, in consequence, perhaps, a measurable enhancement of the likelihood of incitement to disorder, by the placement of one of the constructions in a street display window of defendant's gallery on Madison Avenue in the City of New York, and the exhibition and exposure for sale of the companion pieces in the public gallery and mercantile establishment within. Implicit in the invitation to view was the opportunity thereby afforded to join in the protest, or in counterprotest, with the consequent potential of public disorder; or so the trier of the facts could properly find.

The Supreme Court's reversal of *Street* (394 U.S. 576, *supra*) seems not to have questioned or disturbed the rationale enunciated here by Chief Judge Fuld. The majority felt that since it could not be determined what part of Street's conviction rested on the fact that he was charged with uttering constitutionally protected words and what part upon his act of setting fire to the flag, the conviction could not be upheld. The majority expressly left open the question concerning the validity of the conviction insofar as it was sustained on the basis that Street could be punished for flag burning "even though the burning was an act of protest" (p. 594).[3]

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[3] Thus, Mr. Justice Harlan, writing for the majority, said: "[W]e reiterate that we have no occasion to pass upon the validity of this conviction insofar as it was sustained by the state courts on the basis that Street could be punished for his burning of the flag, even though the burning was an act of protest. Nor do we perceive any basis for our Brother WHITE's fears that our decision today may be taken to require reversal whenever a defendant is convicted for burning a flag in protest, following a trial at which his words have been introduced to prove some element of that offense." (*Street* v. *New York*, 394 U.S. 576, 594.)

The dissenters considered that the few words that Street uttered were part of the act of symbolic conduct, from which they could not be separated, and thus posed an issue which the majority opinion should have met.[4]

While it seems well established that a clear violation of a valid statute may not be saved on First Amendment grounds, it is necessary in this case eventually to reach a somewhat different question, which is, whether or not the act said to constitute the violation is tempered by the application of the First Amendment. In other words, while burning, spitting upon and stomping upon the flag are clearly and inherently disrespectful, do we reach a point where other acts may be performed with regard to the flag which do not so easily admit of the requisite contemptuousness; where the intent behind the act may be of the purest sort, but where the results of the act may nevertheless have the effect which, as Chief Judge Fuld found in *Street,* the statute was validly designed to prevent—the arousement of passions likely to lead to disorder? Before considering that problem, and in aid of its solution, it would be well to examine several significant recent cases.

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[4] The salient points of dissent may be quoted as follows: CHIEF JUSTICE WARREN: "Since I am satisfied that the constitutionality of appellant's conduct should be resolved in this case and am convinced that this conduct can be criminally punished, I dissent." MR. JUSTICE BLACK: "The talking that was done took place 'as an integral part of conduct in violation of a valid criminal statute' against burning the American flag in public. I would therefore affirm this conviction." MR. JUSTICE WHITE: "For myself, without the benefit of the majority's thinking if it were to find flag burning protected by the First Amendment, I would sustain such a conviction." MR. JUSTICE FORTAS: "Protest does not exonerate lawlessness. And the prohibition against flag burning on the public thoroughfare being valid, the misdemeanor is not excused merely because it is an act of flamboyant protest." (394 U.S. 576, 605-617.)

In *Hoffman* v. *United States* (256 A. 2d 567 [Ct. of App., D. C., 1969]), the defendant, who was to testify before the House Un-American Activities Committee, upon approaching the House Office Building was arrested for desecrating the flag, in that he was wearing a shirt that resembled the American flag. He was convicted of breaching that part of the statute which proscribed defilement of the flag. On appeal to the District of Columbia Court of Appeals, Hoffman argued that the statute was vague, that he was entitled to First Amendment protection and that his acts did not constitute defilement since he undertook no physical destruction of the flag. On the vagueness question the court held that the statute admitted of that degree of reasonable certainty as to what could constitute a violation, so that it could not be said that a person possessing a reasonable degree of intelligence could not understand what conduct would be disrespectful to the flag and what conduct would not. The First Amendment argument was rather summarily disposed of, the court relying on the recently decided case of *United States* v. *O'Brien* (391 U.S. 367), a draft card burning case hereinafter discussed. Finally, the court held that wearing the flag, or part of it, as a shirt was a rather clear act of defilement in that the flag was thus dishonored; that the idea of dishonorment was the key to the question whether the flag was defiled. The court concluded (256 A.2d 567, 570) "that the use of the word 'defile' in the subject Statute was intended to include public conduct which brings shame or disgrace upon the flag by its use for an unpatriotic or profane purpose. It is our opinion that the wearing of a shirt which resembles the American flag, under the circumstances of this case, is a physical act which defiles the flag in violation of 18

U.S.C. §700. Such a use of the flag would 'degrade and cheapen the flag in the estimation of the people, as well as to defeat the object of maintaining it as an emblem of national power and national honor'. (*Halter* v. *Nebraska*, 205 U.S. 34, 42)." Similarly, in *People* v. *Cowgill* (—— Cal. App. 2d —— [78 Cal. Rptr. 853], app. dsmd. —— U.S. —— [38 U.S. Law Week 3266; Jan. 19, 1970]), the California court affirmed the conviction of a defendant for wearing a vest fashioned from a cut-up American flag, in violation of a flag defilement statute, the court posing and then answering affirmatively the question left open in *Street (supra)*, whether the States have power to protect the flag from acts of desecration and disgrace.

It is necessary to make reference, also, to the draft card burning cases of *United States* v. *Miller* (367 F.2d 72, cert. den. 386 U.S. 911) and *O'Brien* v. *United States* (376 F.2d 538). In *O'Brien*, the First Circuit held that a 1965 amendment to title 50 (§462, subd. [b]) of the United States Code, proscribing destruction of draft cards, was an unconstitutional abridgement of freedom of speech. The Supreme Court disagreed in *United States* v. *O'Brien* (391 U.S. 367, *supra*). The only dissent was that by Justice Douglas. The court, through Chief Justice Warren, noted that the statute on its face deals with conduct having no connection with speech. "It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct. * * * A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records." (391 U.S. 367, 375.)

It should be noted that O'Brien publicly burned his card on the South Boston Courthouse steps, a crowd having been attracted by his and his companions' activities. The draft card statute, like the flag statutes, had a legitimate reason behind its enactment.

One of O'Brien's contentions was that the action he took with his draft card was a communication of ideas by conduct and that this conduct expressed his position as regards the war and the draft. As to this the court stated: "However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. * * * a governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; *if the governmental interest is unrelated to the suppression of free expression;* and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." (391 U.S. 367, 376, 377; emphasis supplied.) Of those requisites the flag desecration statute need only be considered with respect to the one above emphasized.

The discussion thus far enables us to reach certain conclusions. It becomes clear, upon considering Chief Judge Fuld's statement in *Street* (20 NY 2d 231, *supra*), along with the authorities there cited, and the more recent cases discussed just above, that a person with the purest of intentions may freely proceed to disseminate the ideas in which he profoundly believes, but he may not break a valid law to do it. The flag statute has been repeatedly

held valid from the *Halter* case *(supra)* on down, even through *Hoffman* v. *United States (supra)* and *People* v. *Cowgill (supra),* where the flag was not, in either case, burned, spit or trampled upon, but was used, in each case, to further political or ideological viewpoints by employment as an article of clothing. There appears no significant difference between those situations and the one we are here considering. The defendant may have a sincere ideological viewpoint, but he must find other ways to express it. Whether defendant thinks so or not, a reasonable man would consider the wrapping of a phallic symbol with the flag an act of dishonor; he would consider the hanging effigy a dishonor; and to a lesser and more debatable extent it might be found that wrapping the flag in chains, attaching it to a gas meter, and fashioning the other representations involved, were acts dishonoring the flag. The exhibitor who, as in this case, engages to join the artist in the commercial exploitation of the supposed expression of protest stands in no better position.

There appears to be one further question with respect to the First Amendment which the *O'Brien* court (391 U.S. 367, *supra*) was not especially concerned with, having found the draft card law based upon the valid reason that registrants should be required to retain their cards simply to facilitate administration of the act. This question concerns itself with the requirement in *O'Brien,* emphasized above, that the governmental interest be unrelated to the suppression of free expression.

The *Halter* case (205 U.S. 34, *supra*), at which any investigation of the validity of flag statutes must begin, was decided at a time before the Supreme Court was as concerned with First Amendment rights as it is today. Thus,

the effect of *Stromberg v. California* (283 U.S. 359), the case cited by the majority in reversing the *Street* conviction (394 U.S. 576, *supra*), deserves consideration. Miss Stromberg conducted a daily ceremony at a children's summer camp during which the children raised the Soviet flag and recited a pledge of allegiance to it. The California statute made it a criminal offense to display a red flag (1) as a symbol of opposition to organized government, or (2) as an invitation to anarchistic action, or (3) as an aid to propaganda of a seditious character. Miss Stromberg was convicted under the statute, although it was not made clear which of the three criteria were involved in the breach. The court reversed on the ground that if defendant was convicted for flying the flag as a symbol of opposition, her First Amendment right to freedom of expression had been breached.

However, the statutes prohibiting certain kinds of exhibition of foreign flags, and statutes requiring the salute to our flag (cf. *West Virginia State Bd. of Educ.* v. *Barnette,* 319 U.S. 624) are clearly designed for no other purpose than communicative suppression whereas a flag desecration statute is aimed at keeping the public peace. While it is true that violations of the flag desecration statute will probably not occur apart from the expression of an idea, the prime reason for the statute was not to insure suppression of such ideas, but rather to insure preservation of the public peace. The *Halter* case (205 U.S. 34, *supra*) still expresses the law as rephrased in *Street* (20 N Y 2d 231, 236, *supra*), where it is stated: "In any event, whatever motivated the Legislature to act, the statutory purpose is clear—it is to prevent a breach of the peace."

Some enlightenment may also be gained from the implication to be drawn from the *Stromberg* case (283 U.S. 359, *supra*) that had defendant's conviction rested specifically on either or both of the statutory prohibitions relating to anarchistic or seditious actions, it might have been upheld. We thus conclude that the statute before us does not breach the *O'Brien* requirement (391 U.S. 367, 377, *supra*) that the governmental interest served by it must be unrelated to the suppression of free expression; and we affirm the lower court's conclusion that the legitimate public interest which the statute is designed to protect was threatened by the violation of which defendant was convicted.

Appellant's additional contentions are insubstantial and may be dealt with summarily. The statute is not unconstitutionally vague; and at least two of the "constructions" clearly cast the flag into dishonor. (*Hoffman* v. *United States*, 256 A.2d 567, *supra; People* v. *Cowgill*, —— Cal. App. 2d —— [78 Cal. Rptr. 853], app. dsmd. —— U. S. —— [38 U.S. Law Week 3266; Jan. 19, 1970], *supra.*)

Another argument is addressed to the factor of intent; but even if we assume that defendant had an honest political intent in exhibiting these constructions, or that he had no intent at all, that element is not essential to a conviction of violating a statute which is *malum prohibitum.* (*People* v. *Werner*, 174 N.Y. 132, 134; *People* v. Kibler, 106 N.Y. 321, 322-323.)

No less tenuous is appellant's claim of denial of equal protection, predicated on the provision exempting from the operation of the statute "a certificate, diploma, warrant, or commission of appointment to office, *ornamental picture,* article of jewelry, stationery * * * or newspaper

or periodical, on any of which shall be printed * * * said flag * * * disconnected and apart from any advertisement" (former Penal Law, §1425, subd. 16; emphasis supplied); and equally insubstantial is his contention based on the grammatical imperfection apparent in paragraph d of subdivision 16, it being clear beyond dispute that "flag" is the intended object, as it is the explicit object of every other act inhibited by the statute.

The order should be affirmed.

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The order should be affirmed.

Dissenting Opinion of Chief Judge Fuld

I cannot agree with the majority that sufficient legitimate public interest is served by preventing the sale and exhibition of works of art—such as those which formed the predicate for the conviction of the defendant Radich—to justify interference with his right to free expression.

The defendant was the proprietor of a second-floor art gallery on Madison Avenue in New York City. He exhibited for sale seven sculptures, termed "constructions," by an artist named Marc Morrel, in which the latter made use of American flags—or what appeared to be parts of such flags—in various provocative shapes and forms to express protest particularly against the Vietnam War. (See Life Magazine, March 31, 1967, p. 22.) The defendant was charged with defiling and casting contempt upon the flag of the United States, in violation of section 1425, subdivision 16, of the former Penal Law.[1]

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[1] Insofar as relevant, subdivision 16 of section 1425 (now General Business Law, §136) provided:

"16. Any person, who * * *

"d. Shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon * * * by * * * act, or

* * * * *

"f. Shall publicly carry or display any emblem, placard or flag which casts contempt, either by word or act, upon the flag of the United States of America, * * *

* * * * *

"Shall be deemed guilty of a misdemeanor; * * *

"The words flag, standard, color, shield or ensign, as used in this subdivision or section, shall include any flag, standard, color, shield or ensign, or any picture or representation, of either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be * * * said flag, standard, color, shield or ensign, of the United States of America * * * or a picture or a representation * * * thereof,

At the trial, the Art News Editor of the New York Times testified that he considered the sculptures or constructions to be works of art, more specifically, a form of "protest art" which (he added) was a long established type of art, exemplified by the works of such artists as Michaelangelo, Goya and Picasso. The defendant also testified, stating that, although the works express a political viewpoint, neither he, nor the artist intended to defile or cast contempt upon the flag. It was his belief, he asserted, that the artist, far from intending to do so, was seeking, rather, to convey the idea that others were contemning the flag by committing aggressive acts in its name.

The court, in affirming the conviction, places primary reliance upon *People* v. *Street* (20 N Y 2d 231, revd. on other grounds, 394 U.S. 576) in which we held that the State may legitimately circumscribe certain acts which are contemptuous of the flag. (See People v. Street, 24 N Y 2d 1026, 1028.) However, there is nothing in our opinion in that case which suggests that the mere fact that a person chooses to express himself by other than verbal means removes him entirely from the protections of the First Amendment. On the contrary, we wrote as follows (20 N Y 2d, at p. 235):

"It is the teaching of the cases that the constitutional guarantee of free speech covers the substance rather

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upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, colors, standard, shield or ensign of the United States of America * * *.

"This subdivision shall not * * * be construed to apply to a[n] * * * ornamental picture * * * on * * * which shall be printed, painted or placed, said flag, standard, color, shield or ensign disconnected and apart from any advertisement."

> than the form of communication and that the right to employ a particular mode of expression will be vindicated only if it has been outlawed not because of any legitimate State interest, but solely for the purpose of censoring the underlying idea or thought."

In other words, in the absence of a showing that the public health, safety or the well being of the community is threatened, the State may not act to suppress symbolic speech or conduct having a clearly communicative aspect, no matter how obnoxious it may be to the prevailing views of the majority. (See, e.g., *Tinker* v. *Des Manes,* 393 U.S. 503, 505, 509; see, also, Note, 68 Col. L. Rev. 1091; cf. *Cowgill* v. *California,* —— U.S. ——, 38 USLW 3266 [decided Jan. 19, 1970], *per* Harlan, J., concurring in dismissal of appeal.)

Quite obviously, the act which was prosecuted in the *Street* case—the public burning of a flag on a street corner in the Bedford-Stuyvesant section of Brooklyn—posed a threat to public order which the State could legitimately act to prevent. Indeed, we likened the public mutilation of a flag to "shouting epithets at passing pedestrians" (20 N Y 2d, at p. 237), a situation patently fraught with danger to the public peace. The same may not, however, be said of the art forms which the defendant before us displayed in the quiet surroundings of his upstairs art gallery on Madison Avenue in midtown Manhattan. In our modern age, the medium is very often the message, and the State may not legitimately punish that which would be constitutionally protected if spoken or drawn simply because the idea has been expressed, instead, through the medium of sculpture.

Unlike the situation in the recent case of *Cowgill* v. *California* (—— U.S. ——, 38 USLW 3266, *supra*),[2] the artist in the present case unquestionably made use of the flag for the purpose of expressing his political philosophy or views, his dissatisfaction with, and opposition to, the Vietnam War and other activities carried on by the Government. The challenged "constructions" were, in effect, but three-dimensional political cartoons. It is quite true that one's political motives may not be relied upon to justify his participation in an activity which is otherwise illegal. But it is equally true that an activity which is otherwise innocent may not be treated as criminal solely because of its political content.

Subdivision 16 expressly exempts from prosecution the display of the flag in "ornamental pictures," and, presumably, this exemption would apply to other forms of art as well. It is evident that the only reason why these works of Morrel were singled out for prosecution was not because the flag was used in the sculptures but solely because of the particular political message which those sculptures were intended to convey. In a very real sense, therefore, it was not the artist's *act* of making use of the flag which is being punished but solely the protest or the political views he was seeking to express thereby.

I have spoken principally of the artist who made the constructions in question. There is even less justification for proceeding against the owner of the gallery in which

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[2] In *Cowgill*, where there was no showing that the use of a cut-up, mutilated American flag was motivated by a desire to express a particular philosophy or point of view—where, in other words, the display had no "recognizable communicative aspect"—the court held that no substantial First Amendment question was presented. (See *Cowgill* v. *California*, —— U.S. ——, 38 USLW 3266, *supra*.)

the works were being exhibited for sale, particularly in view of the absence of any proof that he himself actually intended to defile or cast the flag in contempt. Although it is true that intent need not be an element of a crime—providing it is considered *malum prohibitum*—this is not the case where the challenged conduct involves the expression of political views. The First Amendment is designed not merely to prevent prosecutions but to actively encourage and foster the free dissemination of ideas. Thus, even activity which is not, in itself, subject to the protection of the First Amendment may not be prosecuted in a manner which will have a chilling effect upon the free dissemination of ideas. (See, e.g., *Smith* v. *California,* 361 U.S. 147.)[3]

In sum, I do not understand how it may reasonably be said that the mere display of Morrel's constructions in an art gallery, distasteful though they may be, poses the type of threat to public order necessary to render such an act criminal. This prosecution, in my view, is nothing more than political censorship falling far outside our holding in *People* v. *Street,* and may not be constitutionally sustained.

The judgment appealed from should be reversed.

* * * * * * *

Judgment affirmed. Opinion by Gibson, J. All concur except Fuld, Ch. J., who dissents and votes to reverse in an opinion in which Burke, J., concurs.

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[3] In the *Smith* case (361 U.S. 47), the court held that a bookseller could not be prosecuted for the sale of obscene material unless he was shown to be aware of the contents of the books. The rationale behind that decision—that absolute liability for the dissemination of unprotected material would chill the distribution of legitimate works which were subject to constitutional protection—is, it seems to me, equally applicable here.

Majority Opinion of Trial Court

STRONG, P.J.

The defendant, an art dealer, publicly exhibited for sale at his gallery from December 13, 1966 to January 17, 1967, thirteen three-dimensional objects called "constructions." One of these objects (People's Exhibit 2) was in the display window and consisted of an American flag stuffed and shaped in a form suggesting a human body hanging from a yellow noose around its neck. Among the twelve other "constructions" inside the gallery was one (People's Exhibits 3 and 4) in the form of a large cross with a bishop's mitre on the headpiece, the arms wrapped in ecclesiastical flags and an erect penis wrapped in an American flag protruding from the vertical standard. Other "constructions," all making use of the flag stuffed in various shapes, are described in the complaint herein and portrayed in the photographic exhibits.

This prosecution is brought under paragraphs (d) and (f) of subdivision 16 of Section 1425 of the Penal Law of the State of New York, originally enacted in 1903, which provide as follows:

> "16. Any person, who
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> • • •
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> "d. Shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act, or
>
> • • •
>
> "f. Shall publicly carry or display any emblem, placard or flag which casts contempt, either by word

or act, upon the flag of the United States of America, or

• • •

"Shall be deemed guilty of a misdemeanor;

• • •

"The words flag, standard, color, shield or ensign, as used in this subdivision or section, shall include any flag, standard, color, shield or ensign, or any picture or representation, of either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of, said flag, standard, color, shield or ensign, of the United States of America, or of the state of New York, or a picture or a representation of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, colors, standard, shield or ensign of the United States of America, or of the state of New York.

"This subdivision shall not apply to any act expressly permitted by the statutes of the United States of America, or by the United States army and navy regulations, nor shall it be construed to apply to a certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, stationery for use in private correspondence, or newspaper or periodical, on any of which shall be printed, painted or placed, said flag, standard, color, shield or ensign disconnected and apart from any advertisement."

The defendant moves after trial to dismiss the complaint on the ground that the facts as established do not constitute a violation of the statute and further that, in any case, the statute is unconstitutional for denial to the defendant of free speech, equal protection of the laws, and, because of vagueness, due process of law. Factually, the defendant contends that the "constructions" are a form of sculpture of a kind known as "protest art" and that no contempt for the flag was intended either by the artist or by himself. With particular reference to the cross-form, he claims that it expresses opposition by the artist to what he considers church-condoned American aggressive warfare in Vietnam as symbolized by the flag-wrapped phallus.

We hold that these so-called "constructions" constitute a contemptuous use of the flag of the United States and that the defendant by exhibiting them to the public cast contempt upon it in violation of paragraph (d) of the statute under which this proceeding was instituted. It will not do for the defendant to say that paragraph (d) by itself does not contain an object. Subdivision 16 must be read as a whole, and it is clear that the intended object is contained in the next paragraph, lettered "e," in the words "any such flag, standard, color, shield or ensign." We do not find paragraph (f) to be applicable to the facts presented here.

We further hold that these so-called "constructions" are not within the protection of the exclusionary paragraph of the statute. "Sculpture," if such these objects be, is not expressly exempted, and we see no valid basis for construing an implied exemption for it on the ground urged by the defendant that, "pictures" being expressly excepted, the omission of "sculpture" was a legislative inadvertence. In

any case, it is important to note that only pictures termed "ornamental" are exempted, and we are not prepared to find that the subjects of this prosecution are "ornamental" even by contemporary community standards. It seems clear to us that the legislative intent was to protect from prosecution the printed, painted, or affixed use of the American flag solely for ornamental, as distinguished from advertising, purposes. There is nothing in the statutory language to indicate that the legislature was concerned with the application of the First Amendment. As to these "constructions," it is, therefore, in our opinion of no consequence whether or not the word "pictures" in the exclusionary paragraph be deemed to embrace sculptures.

Obviously this case raises constitutional questions of fundamental importance. As a trial court, we must especially recognize the presumption supporting the validity of duly enacted legislation. The People having no right of appeal from an acquittal, we should not strike down this statute in the absence of a clear and overwhelming showing that it violates one or another of the guarantees set forth in the Bill of Rights. We fail to find such a decisive showing of unconstitutionality.

We do not find the statute here to constitute class legislation clearly in violation of the equal protection clause of the Fourteenth Amendment. As we have pointed out above, the section does not discriminate between pictures generally and sculpture generally. Only "ornamental" pictures are excepted. The legislature did not intend to say that pictures desecrating the flag would be exempted as a basis for prosecution and that similar sculpture would not be so protected. Any contemptuous use of the flag comes within the purview of the statute, whether two-dimensional or three-

dimensional. We find in this statute no arbitrary discriminatory classification.

We cannot find that the freedom of speech guarantee of the First Amendment includes a license to desecrate the flag. It is inconceivable to us that the authors of the Bill of Rights could have intended that the protection of the First Amendment could or should be stretched so far. The language of the Circuit Court of Appeals in *United States* v. *Miller,* 367 Fed. 2d at 79 (cert. denied), a draft card burning prosecution, is apropos. The Court there said: "• • • sincere motivation or the labeling of even nonviolent conduct as symbolic does not necessarily transform that conduct into speech protected by the First Amendment."

In the exercise of its police power, a State may restrict acts which pose an "immediate threat to public safety, peace or order" (*Cantwell* v. *Conn.,* 310 U.S. 296 at 308). In *Halter* v. *Nebraska,* 205 U.S. 34, 41, the Supreme Court, in upholding a statute similar to that involved here as applied to the use of the flag in advertising, said:

> "From the earliest periods in the history of the human race, banners, standards and ensigns have been adopted as symbols of the power and history of the peoples who bore them. • • • Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot."

It seems to us that the prohibited use of the flag in advertising is less of a desecration and therefore less of a threat to public order than the use and exhibition of it in the so-called "constructions" here involved.

The United States Supreme Court decisions, cited by the defendant, in *West Virginia* v. *Barnette,* 319 U.S. 624, *Stromberg* v. *California,* 283 U.S. 359, and *Terminiello* v. *Chicago,* 337 U.S. 1 (cf. *Feiner* v. *New York,* 340 U.S. 315), arose from such different facts and statutes that we do not find them determinative of the issue here involved. In any case, we do not presume to make a final determination as to "where the individual's freedom ends and the State's power begins." The Supreme Court has said that our system places that duty upon it (*Thomas* v. *Collins,* 323 U.S. 516, 529).

In our opinion the language of the statute involved here is not so vague as to violate the due process clause of the Fourteenth Amendment. It seems to us clear enough to apprise any person of ordinary intelligence as to what it permits and what it prohibits. If he wishes to approach the brink of what is proscribed, he necessarily gambles on an adverse finding by the Court. Since we find the statute to constitute "malum prohibitum," no criminal intent to violate it is prerequisite to conviction. *People* v. *Boxer,* 24 N.Y.S.2d 628, 632.

Holding, as we do, that the act of the defendant in publicly exhibiting these so-called "constructions" cast contempt upon the flag of the United States and that no exception in the statute here involved exempted it and, further, that the statute as here applied does not clearly violate any constitutional provision, we find him guilty of the charge against him as set forth in paragraph (d) of subdivision 16 of Section 1425 of the Penal Law of the State of New York.

Comerford, J. concurs in this opinion.

Basel, J. dissents in his own opinion.

Dissenting Opinion of Judge Basel

Defendant Radich is charged with a misdemeanor by reason of exhibiting and offering for sale in his art gallery a form of sculpture called "constructions" designed of American flags in forms described in the majority opinion. Defendant's gallery is well established in the New York art world. The exhibition was reviewed by art critics including the critic for The New York Times and was treated as a serious artistic offering. The works complained of, when displayed, were accompanied by a musical background of taped anti-war songs. The sound must be considered part of the exhibit. Modern artists often use additional media to accompany their visual creations to express their ideas more completely and to create a total effect. It is in the context of the anti-war theme, the statement the artist attempts to make must be judged. Defendant describes his efforts as "protest art." The creator of this work specifically protests America's participation and leadership in the Vietnam war.

There are many Americans in opposition to the war, who revere the flag and to whom, "it signifies government resting on the consent of the governed, liberty regulated by law, the protection of the weak against the strong, security against the exercise of arbitrary power and absolute safety for free institutions against foreign aggression." *Halter* v. *Nebraska,* 205 U.S. 34, 43. These loyal dissenters vehemently, honestly and passionately oppose U.S. intervention in Vietnam. They have devised varied means to express their opposition. This group argues, and many are veterans who fought to protect the flag, that the flag is being placed in contempt by our "aggression" and per-

sistence in this war. They protest that the image of the American flag as a symbol of freedom to lovers of liberty and a shining object to the oppressed is cast in contempt. This is the message the artist seeks to convey, in the work defendant exhibited. We may quarrel with his theme, disagree with his method, condemn his goal. We cannot dispute his right to express dissent even though the means be loathsome to us. " . . . laws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men." *Board of Education* v. *Barnette,* 319 U.S. 624, p. 644. We can also not ignore the fact that large groups of Americans agree with his dissent, as witness the recent march of 100,000 upon the U.N. " . . . freedom to differ is not limited to the things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *Board of Education* v. *Barnette,* supra, p. 642.

It is not the dissent for which defendant is prosecuted, we are told, it is the method that is condemned. It is the fact that the artist whose work defendant exhibits has chosen as his means of expression, to defile the flag by hanging it in effigy, draping it in chains, shaping it as a phallus on a cross, this opposition may no longer be characterized as free expression, it is contemptuous conduct. The sculptor cannot declare his dissent in this form, it is argued, because it violates and shames the symbol of our land and is thus a crime as defined in Penal Law Sec. 1425, Subdivision 16(d) and (f).

Defendant contends artist is not showing contempt for the flag. He supports what it symbolizes, liberty, equality, freedom, but he protests by means of these "constructions"

that those virtues have been abandoned by United States conduct in Vietnam. The ideals the flag represents, he argues, are enchained, its inspiration publicly hangs in shame before the world, and the church and state are jointly to be charged as violators of the innocent. He makes that protest visible, it takes sculptural form.

It is essential that legislation which is criminal in character be clearly drawn and precise so that those enforcing it will know its meaning and those subject to it can clearly regulate their conduct. If such legislation has a tendency to impair or impede free speech it must be judged ultra carefully. *Winters* v. *New York,* 333 U.S. 507, 509; *Stromberg* v. *California,* 283 U.S. 359; *Herndon* v. *Lowry,* 301 U.S. 242. As Judge Learned Hand said in *Masses Publishing Co.* v. *Patten,* 244 Fed. 535, 540: "Assuming that the power to express such opinion, (hostile criticism) may rest in Congress in the throes of a struggle for the very existence of the state, its exercise is so contrary to the use and wont of our people that only the *clearest* expression of such a power justifies the conclusion it was intended." Section 1425, subdivision 16(d) reads in full: "Shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words, or act." It does not describe the object of this condemnation. Although a reading of the full statute (all of Section 1425, subdivision 16 might suggest it was a flag that was the legislature's concern, "16(d)" does not say so and it is the only subsection in 1425 (16) which omits the word "flag." It would be novel criminal law to convict anyone under such a statute, to read the word flag into it in order to obtain a conviction is in my view clearly unconstitutional.

The prosecution and the question is thus narrowed and confined to the validity of subsection 16(f) "shall publicly

carry or display any emblem, placard or flag which casts contempt, either by word or act upon the flag of the United States of America."

Who shall be the judge of what *word* or *act* is contemptuous? Which *act*, what *words* constitute contempt?

"The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime must be defined with appropriate definiteness." *Cantwell* v. *Conn.*, 310 U.S. 296; *Pierce* v. *U. S.*, 314 U.S. 306, 311. "There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of an enactment . . ."

Winters v. *N. Y.*, 333 U.S. 507, 518. *U. S.* v. *Cohen Grocery Co.*, 255 U.S. 81.

In *Herndon* v. *Lowry*, supra, p. 263, the Supreme Court said: "The statute, as construed and applied, amounts merely to a dragnet which may enmesh anyone who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect in the future conduct of others. No reasonably ascertainable standard of guilt is prescribed. So vague and indeterminate are the boundaries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment." See also *People* v. *Bookcase, Inc.*, 14 N.Y. (2) 409, *People* v. *Kahan*, 15 N.Y. (2) 311.

The statute in the instant case is drawn so broadly and is so vague that any words or any acts to which someone in authority takes offense can be deemed criminal. " . . . the constitutionality of a statute governing publications is to be tested by what *can* be done under it and not by the *particular* violation which is charged with having occurred."

People v. *Bookcase,* supra, p. 418. The 100,000 who marched upon the U.N. are critical of the uses to which the flag is being put in Vietnam, as are Senator Fulbright, Senator Hatfield and thousands of others. Are they guilty of a crime if they *say* the flag has been placed in chains by United States conduct? No one would seriously argue they be jailed for expressing verbally or in writing what the artist here makes visual. I agree with defendant's art expert that the artist's talent is limited, his symbolism obvious, cliche and lacking in imagination. I acknowledge he has chosen a means of expression in extreme poor taste and shabby in form. But is he to be punished for his lack of manners and his vulgarity when his intention is a serious condemnation of our present foreign policy? Who is to judge under this statute if what he did is unlawful? If those who marched in opposition are his judges, it is doubtful they will find his conduct contemptuous. If those who hurled insults at the parade were on his jury, they would almost certainly find him guilty. "A person gets from a symbol the meaning he puts into it." *Board of Education* v. *Barnette,* supra, p. 633. "It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." *U. S.* v. *Cohen Grocery Co.,* supra, p. 89. The legislature has established standards so vague, indefinite, imprecise and subjective, the statute under discussion should be held unconstitutional. As Chief Justice Hughes said in *Stromberg* v. *California,* supra, p. 369, "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system. A statute which upon its face . . .

is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment."

Halter v. *Nebraska*, supra, relied upon by the People and the majority opinion and followed in *People* v. *Picking*, 288 N.Y. 144, is distinguishable. In a recent case involving disrespect for the flag, in Federal District Court, Southern District, although the court did not take jurisdiction for procedural reasons, it said: ". . . . the substantive constitutional issues are not insubstantial. This view can scarcely be altered by *Halter* which was decided several years before the protections of the First Amendment were held firmly applicable to the states through the Fourteenth Amendment. However, the argument that the statute is unconstitutional for vagueness was notably absent in the *Halter* case." P. 7. *Dunncombe* v. *State of N. Y.*, U.S. DC So. Dist. N.Y. 67, Civ. 1085 April 11, 1967, Bryan J. *Halter* also passed only on the advertising provisions of Section 1425. These are more carefully drawn than 1425, 16(d) and (f), and are more detailed and not vague. *Halter* is further distinguished by the fact that advertising is not yet protected by the First Amendment.

The other argument advanced by defendant, that the statute intends to exempt all forms of expression as protected by the First Amendment and that all sculpture as well as all painting is included in the descriptive term in the statute, "ornamental painting," does not require discussion in view of the opinion here expressed as to the unconstitutionality of the statute.

The motion to dismiss should have been granted and the defendant found not guilty. I dissent from the majority view.

Opinion of Three-Judge Court in Hodsdon v. Buckson

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

Civil Action No. 3500

WILLIAM M. HODSDON,

Plaintiff,

v.

DAVID P. BUCKSON, Attorney General of the State of Delaware, and RUTH M. FERRELL, Deputy Attorney General of the State of Delaware,

Defendants.

William E. Taylor, Jr., of Taylor & Lindh, Wilmington, Delaware, for plaintiff.

David P. Buckson, Attorney General of Delaware and Ruth M. Ferrell, Deputy Attorney General, for defendants.

Wilmington, Delaware
March 18, 1970

Before SEITZ, *Circuit Judge,* and WRIGHT and LAYTON, *District Judges.*

WRIGHT, District Judge.

Plaintiff William M. Hodsdon is here seeking declaratory and injunctive relief pursuant to 28 U.S.C. §§2201-2202 and 42 U.S.C. §1983. Specifically, he requests this court to declare a section of the Delaware Code, 11 Del. C. §532, unconstitutional, and to enjoin defendants David P. Buckson, Attorney General of Delaware, and Ruth M. Ferrell, Deputy Attorney General, from continuing to prosecute him for a violation thereof. This three-judge court was convened because requests for relief invoke the provisions of 28 U.S.C. §§2281-2284.

The state indictment of which plaintiff here complains is the culmination of a series of efforts to cause him to cease using his American flag to express displeasure with United States involvement in the Vietnam war and with what he considers various civil injustices. The state of Delaware first brought an action in the United States District Court for the District of Delaware seeking to enjoin plaintiff's display of the flag inconsistent with the flag etiquette provisions of 36 U.S.C. §§174-178. The District Court dismissed that action for lack of jurisdiction. State of Delaware ex rel. Trader v. Hodsdon, 265 F. Supp. 308 (1967).

On April 18, 1967, defendants secured an indictment in the Delaware Superior Court against plaintiff for violation of 11 Del. C. §532. That section reads, in relevant part, as follows:

> "Whoever publicly mutilates, defaces, defiles, defies, tramples upon or casts contempt either by word or act upon (the American flag)— Shall be fined not more than $100 or imprisoned not more than 30 days, or both."

The indictment charged that plaintiff had violated the act at numerous times beginning in July, 1966, by

> "displaying simultaneously on the front of his residence at 3202 Fernwood Place, Wilmington, Delaware, the United Nations flag in the position of honor on the right side of his house and the United States flag in the subordinate position on the left side of his house and flown in a half-mast position."

Plaintiff moved to dismiss the action in the state court. His motion was denied, as was his request for a writ of prohibition from the Delaware Supreme Court. 239 A.2d 222 (Del. 1968). He then instituted this action on March 14, 1968. This Court heard argument on motions to dismiss and plaintiff's motion for summary judgment. Decision was deferred by agreement among the parties[1] so the Court could have the benefit of an impending decision of the United States Supreme Court thought to deal with the issues here. Street v. New York, 394 U.S. 576 (1969).

Plaintiff urges this Court to declare the statute unconstitutional "in that it abridges plaintiff's right of freedom of speech," and on the ground "that it is impermissibly vague and indefinite."

If plaintiff attacked the statute solely for its vagueness, it would be necessary to decide if a narrowing construction by the state courts "would avoid or modify the constitutional question." Zwickler v. Koota, 389 U.S. 241 (1967). The possibility of such construction would require abstention from needless intervention in state court proceedings. Harrison v. NAACP, 360 U.S. 167 (1959). Here, however,

[1] Defendants agreed not to proceed with the pending prosecution until a decision in this action.

plaintiff also attacks the statute on its face, and if no conceivable construction[2] will repair, unconstitutional infirmities, abstention is both unnecessary and improper. Zwickler v. Koota, supra, at 249-252.

Having carefully examined this statute, giving due presumption to its validity, the Court concludes that no construction could remedy its impermissible intrusion into areas of expression protected by the First Amendment. The Court cannot abstain, and, for reasons hereafter stated, holds that 11 Del. C. §532 is unconstitutionally overbroad.

As Mr. Justice Harlan pointed out in *Zwickler* overbreadth and vagueness are not always easy or profitable to distinguish. 389 U.S. at 255-257 (concurring opinion). Statutes which suffer from one often suffer from the other.[3]

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[2] In his letter opinion denying the motion to dismiss in the state court, Judge Quillen gave a lengthy construction of the statute. He said:

> As I interpret the crucial statutory words used in this indictment, their purpose is to convict those who publicly and intentionally commit acts or speak words either calculated to defile, defy, or cast contempt upon the American flag or done with a callousness as to their result in that regard. It is inconceivable to me that our legislature intended this statute to be used to convict those who inadvertently damage the flag. *Compare State* v. *Tabasso Homes, Inc.*, 3 Terry 110, 28 A.2d 248, 254 (Gen. Sess. 1942). More specifically, I interpret the statutory words involved here to require not only that the acts alleged be acts which dishonor the flag in the mind of a reasonable man, but also that they be done by the defendant with the intent so to dishonor the flag or with a conscious indifference to that result. I think this follows from the words themselves, "defile, defy, or cast contempt . . . upon." Page 6 of letter opinion dated January 15, 1968.
>
> Whether or not his construction represents the final opinion of the Delaware courts on the meaning of the statute would present a nice question, but one this Court need not decide. Neither that construction nor any other would remedy the statute's basic defect.

[3] Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 871-876 (1970).

This Court understands overbreadth to be the statutory result when the legislature, having the power to regulate certain conduct, strikes so bluntly as to proscribe constitutionally protected conduct as well. See Note, *The Void for Vagueness Doctrine in the Supreme Court,* 109 U.Pa.L.R. 67, 96-97 (1960), and Note, *The First Amendment Overbreadth Doctrine,* 83 Harv.L.R. 844 (1970). Whether the overbroad sweep results from a clear intent to regulate both types of conduct, or from use of vague and confusing terms, the defect is fatal.

The danger of chilling the exercise of fundamental freedoms, especially those protected by the First Amendment, requires that when the conduct regulated approaches a protected zone, government regulate "only with narrow specificity." "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms," because those freedoms need "breathing space to survive." NAACP v. Button, 371 U.S. 415, 433, 438 (1963).

As the Supreme Court noted in *Button,* the objectionable aspect of overbreadth is not the absence of fair notice of the statute's import, but rather the danger of tolerating "a penal statute susceptible of sweeping and improper application. . . ." Id. at 432-433. In Shelton v. Tucker, 364 U.S. 479, 488 (1960), the Court said:

> ". . . even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when that end can be more narrowly achieved."

See Note, *Less Drastic Means and the First Amendment,* 78 Yale L.J. 464 (1969). The Delaware statute attacked

here is capable of an application so sweeping and improper that even if some of its goals may constitutionally be reached,[4] it must fall in its entirety, lest protected expression be deterred by fear of prosecution.

No cases provide clear precedent for the holding here, but several decisions of the Supreme Court offer guiding principles. In Street v. New York, 394 U.S. 576 (1969), the defendant asserted that his conviction under a New York statute[5] substantially identical to the one attacked here abridged his freedom of expression. To protest the shooting of civil rights leader James Meredith, Street burned an American flag on a Brooklyn street corner. As the flag burned, he exhorted a small crowd, "We don't need no damn flag . . . . If they let that happen to Meredith we don't need an American flag."

The Supreme Court agreed with Street that the conviction abridged his freedom of expression. It based the holding, however, on the fact that the statute permitted him to be convicted either solely for the contemptuous words which accompanied his burning the flag or for the combination of words and act. His words, said the Court, were protected by the First Amendment and could not constitutionally support a conviction.

The Court identified four governmental interests that might be furthered by punishing Street for his words: (1) an interest in preventing him from vocally inciting others to commit unlawful acts; (2) an interest in preventing him from uttering words so inflammatory that they

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[4] Four justices had no doubt, at the time of *Street* v. *New York*, *supra*, that the state could punish the act of burning the flag. See dissenting opinion of the Chief Justice and Justices White, Black, and Fortas in that case.

[5] N. Y. Penal Laws §1425, subd. 16, par. d.

would provoke others to retaliate physically against him, causing a breach of the peace; (3) an interest in protecting the sensibilities of passersby who might be shocked by Street's words about the American flag; (4) an interest in assuring that Street, regardless of the impact of his words on others; showed proper respect for the national symbol. None of those interests, concluded the Court, could constitutionally justify a conviction under the statute. The Court had " . . . no doubt that the constitutionally guaranteed 'freedom to be intellectually . . . diverse or even contrary,' and the 'right to differ as to things that touch the heart of the existing order,' encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous." Street v. New York, supra, at 593.

The Supreme Court intimated no opinion in *Street* as to the constitutionality of efforts to punish *acts* alone which "mutilate, deface, defile or defy, trample upon, or cast contempt upon" the flag. Defendants here urge that the "words" portion of the Delaware statute is severable, and that insofar as the "acts" portion is concerned, *Street* made no determination of its validity. This Court agrees. The crucial issue, therefore, is whether, although the state may not by a statute like the one here punish words defiant or contemptuous of the flag, it may nevertheless punish acts which convey identical ideas.

Expression is not confined to the spoken and written word. A court may take judicial notice of the symbolic significance of particular acts.[6] Nor is expression deprived of

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[6] *United States* v. *O'Brien*, 391 U.S. 367 (1968); see also the footnote to Mr. Justice Harlan's opinion concurring in dismissal of the appeal in *Cowgill* v. *California*, 38 USLW 3266 (1970).

constitutional protection because it is nonverbal. In Stromberg v. California, 283 U.S. 359 (1931), a state statute forbidding display of a red flag "as a symbol of opposition to organized government or as an invitation or stimulus to anarchistic action" was held unconstitutional. More recently, in Tinker v. Des Moines School District, 393 U.S. 503 (1969), the Court held that wearing black armbands for the purpose of expressing opposition to the war in Vietnam was closely akin to "pure speech" and that, inasmuch as it was not associated with any actually or potentially disruptive conduct, it was beyond the regulatory power of school authorities. Thus, although acts are not beyond regulation because they have symbolic components,[7] in the absence of factors justifying limitation, symbolic speech is constitutionally protected. This Court takes judicial notice of the symbolic significance of flying the American flag. Like the conduct in *Tinker*, it is closely akin to "pure speech," and if a statute attempts to regulate it in furtherance of no interest other than suppression of expression, this Court has no choice but to strike that statute down.

Defendants maintain that laws such as this one are legitimate exercises of the state's police power. The state has a strong interest in protecting the national symbol and encouraging patriotism, as well as in preventing breaches of the peace surely ensuing from desecration of that symbol, they say, and individual liberties must yield when restraints are reasonable and directed to those interests. Halter v. Nebraska, 205 U.S. 34 (1907); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Adderley v. Florida, supra; Cameron v. Johnson, 390 U.S. 611 (1968).

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[7] *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1948); *Adderley* v. *Florida*, 385 U.S. 39 (1966).

Defendants urge that the instant case is controlled by the rationale of United States v. O'Brien, 391 U.S. 367 (1968), and United States v. Miller, 367 F.2d 72 (2d Cir. 1966) cert. den. 386 U.S. 911. Those cases held that the national interest in efficient administration of the selective service system justifies limitation of freedom to burn one's registration card as a protest. In *O'Brien*, the Court said:

> ". . . when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitation on First Amendment freedoms." 391 U.S. at 376.

Accordingly, argue defendants, the strong interest in regulating the nonspeech elements in conduct associated with the flag justifies incidental intrusions on whatever speech elements may be involved.

That the state has an interest in the preservation of the national symbol is not disputed. Nor is it questionable that the interest permits some types of regulation, to the detriment of asserted freedoms. Halter v. Nebraska, supra; Cowgill v. California, 78 Cal. Rptr. 853 (1969), appeal dismissed 38 USLW 3266. The Court said in *O'Brien*, however, that a government regulation is justified if it meets four criteria:

(1) It is within the constitutional power of the government;

(2) It furthers an important or substantial governmental interest;

(3) The governmental interest is unrelated to the suppression of free expression; and

(4) The incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. U. S. v. O'Brien, supra, at 377.

The Court distinguished *O'Brien* from a case "where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." Specifically, the Court distinguished *Stromberg* v. *California,* supra: "Since the statute there was aimed at suppressing communication, it could not be sustained as a regulation of noncommunicative conduct." Id. at 382.

In the present case, although nonspeech elements are present in the conduct regulated, the statute is so broad that it strikes where no interest is served other than the proscription of expression. Unlike the statute sustained in *O'Brien,* narrowly drawn and clearly directed to the preservation of a national administrative scheme, this law encompasses acts which bear no relation to any interest within the legislative competence and which are intended and understood as symbolic speech.

11 Del. C. §532 does not, for example, limit itself to deviations from orthodox display procedures. It is directed not to rules, if they exist, governing display of the flag, but to the attitude displayed by the person who flies it. If there are limitations on the protection afforded conduct by the First Amendment, they are defined by exigencies other than the prevention of public expression of attitudes—even those of defiance or contempt. That Amendment indeed guarantees the right to express such attitudes toward the government, and it is the strength of our democracy that they

are tolerated in almost all their public manifestations. That tolerance is not only a benefit flowing from diligent protection of fundamental freedoms; it is a *sine qua non* of their continued enjoyment.

Nor does the statute limit itself to those who fly the flag. Any act which casts contempt upon or defies it, whether affecting it physically, or not, is potentially illegal. Gestures or salutes which identify unpopular or controversial groups may apparently be forbidden. Defendants themselves have indicated that schools in Delaware may invoke the statute to forbid students to render the so-called "clenched fist" or "black power" salute to the flag at athletic events.[8]

In Barnette v. West Virginia Board of Education, 319 U.S. 624 (1943), the Supreme Court held that a state could not make performance of a flag salute and pledge of allegiance a condition of free public education, and refusal tantamount to delinquency. It noted that the state's employment of the flag "as a symbol of adherence to government as presently organized" inevitably cast the issue as one of expression. "It [the state] requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks." 319 U.S. at 633-634.

The teaching of *Barnette* is that the state cannot compel a gesture of adherence to the American flag. Whether under some circumstances the state can forbid gestures of nonadherence, disapproval or contempt is not decided there nor in any other decision brought to the attention of the Court. The statute attacked here, however, makes no effort

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[8] See Attorney General's opinion to Mr. Roger C. Mowrey, Asst. Supt. Administrative Services, Department of Public Instruction, dated September 17, 1969, on the question "May the practice by students and nonstudents of raising their hands in a 'black glove salute' at public school sporting events legally be restricted?"

to limit the facts and circumstances under which such gestures are forbiddden. The Court believes that the rationales of *Barnette* and *Stromberg* together compel the conclusion that the punishment of peaceful symbolic acts rejecting the political ideas bespoken by the flag is as alien to the mandate of the First Amendment as is compulsion to signify adherence. That this statute proceeds, heedless of the guarantees of that amendment, to proscribe such acts determines its invalidity.

The state does, of course, have an interest in preventing breaches of the peace, and this decision does not derogate from the power to control disruptions ensuing from public desecration of the flag. Such power is inherent in the sovereignty of states, and legitimate means of exercising it are available. Chaplinsky v. New Hampshire, supra, Feiner v. New York, 340 U.S. 315 (1951). But cf. Cantwell v. Connecticut, 310 U.S. 296 (1940). Efforts at preventing breaches of the peace have run aground only when they failed to assure that only speech which actually incites to violence, or which is "likely to provoke the average person to retaliation" is forbidden. Chaplinsky v. New Hampshire, supra, at 574. As the Supreme Court stated in *Street,* such statutes must be "carefully drawn so as not unduly to impair liberty of expression." Nothing in 52 Del. C. §532 safeguards against impairment of that liberty when the public order is not threatened. The attempted application to plaintiff belies any such limitation.

In *Street,* the Supreme Court commented that "disrespect for our flag is to be deplored no less in these vexed times than in calmer periods of our history." We agree. Nevertheless, that the times are difficult and that the issues are emotional calls for more, not less, diligence in safe-

guarding our cherished freedoms. The often quoted lines from *Barnette* are as apt today as they were in 1943:

> "The case is made difficult not because the principles of its decisions are obscure, but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization.
>
> . . . . . .
>
> We have individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. . . . But freedom to differ is not limited to things that do not matter much. That would be the mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by *word* or *act* their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." (Emphasis added). 319 U.S. at 641-642.

The statute here challenged includes within its ambit expression protected by the United States Constitution. The failure of the legislature to regulate with particularity and specificity in this not too clearly charted area of First Amendment rights poses a danger of chilling vigorous and

important debate and compels the Court to hold the statute unconstitutional.

Plaintiff also requests that defendants be enjoined from proceeding further against him under the act now declared unconstitutional. This Court finds no reason to assume that the state of Delaware or its officers will attempt to deny plaintiff full protection of his First Amendment rights, nor does it find in the record any of the factors discussed in Dombrowski v. Pfister, 380 U.S. 479 (1965), Cameron v. Johnson, 390 U.S. 611 (1968) and Zwickler v. Koota, supra, necessary to justify such extraordinary relief. No injunction shall issue, without prejudice to plaintiff to request of this Court such relief should subsequent events require it.[9]

Submit order.

COLLINS J. SEITZ
United States Circuit Judge

CALIB M. WRIGHT
United States District Judge

CALEB R. LAYTON
United States District Judge

Wilmington, Delaware.
March 18, 1970

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[9] That injunctions under 42 U.S.C. §1983 are exceptions to the prohibition against injunction of state court proceedings contained in 28 U.S.C. §2283 is clear from the recent decision of *Grove Press Inc.* v. *City of Philadelphia*, 418 F.2d 82 (3d Cir. 1969), and the earlier case of *Cooper* v. *Hutchinson*, 184 F.2d 119 (3d Cir. 1950).

Order of Court of Appeals Below

COURT OF APPEALS

STATE OF NEW YORK, *ss.*:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 18th day of February in the year of our Lord one thousand nine hundred and seventy, before the Judges of said Court.

WITNESS,

THE HON. STANLEY H. FULD,
Chief Judge, Presiding.

RAYMOND J. CANNON,
Clerk.

REMITTITUR February 18, 1970.

App. T. 1. No. 368.

THE PEOPLE &C.,

Respondent,

VS.

STEPHEN RADICH,

Appellant.

BE IT REMEMBERED, That on the 22nd day of August in the year of our Lord one thousand nine hundred and sixty-nine, Stephen Radich, the appellant in this cause, came here unto the Court of Appeals, by Richard G. Green and Shirley Fingerhood, his attorneys, and filed in the

said Court a Notice of Appeal and return thereto from the judgment of the Appellate Term of the Supreme Court in and for the First Judicial Department. And The People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Richard G. Green, of counsel for the appellant, and by Mr. Jerry Slater, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Criminal Court of the City of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Criminal Court of the City of New York, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Criminal Court, before the Judges thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, February 18, 1970.

(Seal)

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
Clerk.

Statute Involved

SECTION 1425, PENAL LAW OF NEW YORK (now GENERAL BUSINESS LAW, §136)

"16. Any person, who * * *

"d. Shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon * * * by * * * act, or

* * * * *

"f. Shall publicly carry or display any emblem, placard or flag which casts contempt, either by word or act, upon the flag of the United States of America, * * *

* * * * *

"Shall be deemed guilty of a misdemeanor; * * *

"The words flag, standard, color, shield or ensign, as used in this subdivision or section, shall include any flag, standard, color, shield or ensign, or any picture or representation, of either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be * * * said flag, standard, color, shield or ensign, of the United States of America * * * or a picture or a representation * * * thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, colors, standard, shield or ensign of the United States of America * * *.

"This subdivision shall not * * * be construed to apply to a[n] * * * ornamental picture * * * on * * * which shall be printed, painted or placed, said flag, standard, color, shield or ensign disconnected and apart from any advertisement."

SUPREME COURT, U. S.

FILED
JUL 2 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1970

No. 169

STEPHEN RADICH,

Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

	PAGE
Proceedings Appealed From	2
Statute Involved	2
The Complaint	5
The Evidence at the Trial	7
The People's Case	7
The Defendant's Case	8
Argument:	
I—Conduct that casts contempt upon the American flag is not protected by the First Amendment guarantee of freedom of speech	10
II—The statutory exception which permits certain uses of the flag in a non-contemptuous manner and disconnected from advertisement does not deny appellant equal protection	15
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Adderley v. Florida, 385 U. S. 39 (1966)	11
Cox v. Louisiana, 379 U. S. (1965)	11
Halter v. Nebraska, 205 U. S. 34 (1907)	11, 15,16
Hoffman v. United States, 256 A.2d 567 (Ct. of App., D.C. 1969)	12
People v. Cogwill, 78 Cal. Rptr. 853 (Cal. App. 1969), *app. dism.* —— U. S. —— (1970)	12, 13

PAGE

People v. Finkelstein, 9 N.Y.2d 342 (1962) 15
People v. Radich, 26 N.Y.2d 114 (1970) 12
People v. Street, 20 N.Y.2d 231 (1967), *rev'd.* 394 U. S. 576 (1969) 12

Roth v. United States, 354 U. S. 476 (1957) 14

Schacht v. United States, —— U. S. —— (1970) 13
Smith v. California, 361 U. S. 147 (1959) 15
State v. Schlueter, 23 A.2d 249 (N.J. 1941) 12
Street v. New York, 394 U. S. 576 (1969) 13
Stromberg v. California, 283 U. S. 359 (1931) 13

Tinker v. Des Moines, 393 U. S. 503 (1969) 13

United States v. O'Brien, 391 U. S. 367 (1968) 11, 13

West Virginia v. Barnette, 319 U. S. 624 (1943) 14
Winters v. New York, 333 U. S. 507 (1948) 14

Statutes and Constitution

N.Y. Former Penal Law §1425 ..... 2-5, 7, 15-16
N.Y. General Business Law §136 2
U.S. Constitution, First Amendment 11

IN THE

Supreme Court of the United States

October Term, 1969

No. 1589

STEPHEN RADICH,

Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of this Court, the appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Appeals of New York on the ground that it is in accord with controlling constitutional principles.

Proceedings Appealed From

Radich appeals from an order of the Court of Appeals of New York entered February 18, 1970 affirming, with an opinion, two judges dissenting (26 N.Y.2d 114), an order of the Appellate Term, First Judicial Department, of the Supreme Court of the State of New York, entered June 13, 1968 unanimously affirming, without an opinion (57 Misc. 2d 1082), a judgment of the Criminal Court of the City of New York, New York County, rendered May 5, 1967 convicting Radich, after a trial before three judges, one judge dissenting (53 Misc. 2d 717), of Malicious Injury to and Destruction of Property (former N. Y. Penal Law §1425 (16)(d), presently N. Y. General Business Law §136) and sentencing him to a fine of $500 or in lieu thereof 60 days' imprisonment.

Statute Involved

Section 1425, subdivision 16, of the former New York Penal Law* provides (emphasis added):

> 16. Any person, who
>
> a. In any manner, for exhibition or display, shall place or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement, of any nature upon any flag, standard, color, shield or ensign of the United States of America, or the state of New York, or shall expose or cause to be exposed to public view any such flag, standard, color, shield or ensign, upon which after the first day of September, nineteen hundred and five, shall have been printed, painted or

* Now §136, par. d of the New York General Business Law.

otherwise placed, or to which shall be attached, appended, affixed, or annexed, any word figure, mark, picture, design or drawing or any advertisement of any nature, or

b. Shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale, or to give away, or for use for any purpose, any article, or substance, being an article of merchandise, or a receptacle of merchandise or article or thing for carrying or transporting merchandise, upon which after the first day of September, nineteen hundred and five, shall have been printed, painted, attached, or otherwise placed, a representation of any such flag, standard, color, shield or ensign, to advertise, call attention to, decorate, mark, or distinguish, the article or substance on which so placed, or

c. Shall print, engrave, or otherwise place or cause to be printed, engraved or otherwise placed on any blank check, bill head, letter head, envelope or other business stationery, a representation of any such flag, standard, color, shield or ensign, or shall use any such blank check, bill head, letter head, envelope or other stationery for business purposes or correspondence, or

d. *Shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon* either *by* words or *act*, or

e. Shall raffle or place in pawn any such flag, standard, color, shield or ensign, or

f. Shall publicly carry or display any emblem, placard or flag which casts contempt, either by word or act, upon the flag of the United States of America, or

g. Shall publicly use or cause any such flag, standard, color, shield or ensign, to be publicly used as a receptacle for the placing, depositing or collecting of money or any other article or thing,

Shall be guilty of a misdemeanor; * * *

The words flag, standard, color, shield or ensign, as used in this subdivision or section, shall include any flag, standard, color, shield or ensign, or any picture or representation, of either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of, said flag, standard, color, shield or ensign, of the United States of America, or of the state of New York, or a picture or a representation of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, colors, standard, shield or ensign of the United States of America, or of the state of New York.

This subdivision shall not apply to any act expressly permitted by the statutes of the United States of America, or by the United States army and navy regulations, nor shall it be construed to apply to a certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, stationery for use in private correspondence, or newspaper or periodical on any of which shall be printed, painted or placed, said flag, standard, color, shield or ensign disconnected and apart from any advertisement.

The possession by any person, other than a public officer, as such, of any such flag, standard, color, shield or ensign, on which shall be anything made unlawful at any time by this section, or of any article or substance or thing on which shall be anything made unlawful at any time by this section shall be presumptive evidence that the same is in violation of this section, and was made, done or created after the first day of

September, nineteen hundred and five, and that such flag, standard, color, shield, ensign, or article, substance, or thing, did not exist on the first day of September, nineteen hundred and five.

The Complaint*

CRIMINAL COURT OF THE CITY OF NEW YORK

Part 7, *County of* New York

State of New York)
County of New York) *ss.*:

Patrolman John P. Burns, *of No.* 19 Precinct, *County of* New York, *City of New York, being duly sworn, deposes and says that on* December 27, 1966 at about 8:30 a.m. and December 28, 1966 *at about* 5:30 p.m. *at* on second floor at 818 Madison Avenue *in the County of* New York *State of New York, the defendant,* STEPHEN RADICH *did commit the crime of*: did violate section 1425 of the New York State Penal Law, subdivision 16-Paragraph d & f, in that any person who shall publicly mutilate, deface, defile or defy, trample upon, or cast contempt upon the flag, standard, shield or ensign, of the United States of America, either by words or act or shall publicly carry or display any emblem, placard or flag which casts contempt, either by word or act, upon the flag of the United States of America:

under the following circumstances:

your deponent states that at the above location, the Radich Gallery, on December 27, 1966 at 8:30 a.m., he observed

* Italicized portion identifies the printed portion of the complaint form.

that the defendant did have on display, in a large window, facing the public sidewalk, the flag of the United States of America, in the form of a body hanging from a yellow noose. Deponent further states that on December 28, 1966 at about 5:30 p.m., at the above mentioned location, the defendant did have on public display and for public viewing, the flag of the United States of America, in the following manner; 1—in the form of a male sexual organ, protruding from the body of form, in the anterior portion of the body of the form and depicting the erected male penis, protruding from a form of a cross. 2—the flag of the United States of America, wrapped in a chained bundle. 3—the standard of the United States on the form of an alleged elephant. 4—The Union of the flag of the United States of America, depicted in the form of an octupus. 5—the American flag attached to a gas meter. 6—The American flag wrapped around a bundle attached to a two wheeled vehicle. 7—The American flag in the form of a body, hanging from a yellow noose. Your deponent further states that the defendant is the owner and operator of the premises mentioned above.

Wherefore deponent prays that the defendant be dealt with according to law.

Sworn to before me
January 4, 1967

(signed) Ptl. John P. Burns

(signed) Walter J. Bayer
Judge, Criminal Court
of the City of New York

THE EVIDENCE AT THE TRIAL

The People's Case

Patrolman **John P. Burns** of the New York City Police Department testified that on December 27, 1966, at 8:30 a.m., while on duty, he was outside the premises 818 Madison Avenue (8-9).* He observed in the second story window of the building what appeared to be the flag of the United States, formed in the shape of a human body, suspended by a yellow noose (9, 18).

The following day, December 28, 1966, at 5:00 p.m., he returned to 818 Madison Avenue, accompanied by Patrolman Myrich of the Police Department's Photo Unit (9). They entered an art gallery located on the second floor. The gallery was open to the public, free of charge (17). Within the gallery, he saw twelve or thirteen exhibits on display (18). Nearby, he saw the defendant engaged in conversation with an unknown female (10). When asked by the officer, the defendant identified himself as Stephen Radich, proprietor of the gallery (10). Thereupon, Patrolman Burns served the defendant with a summons for a violation of Section 1425 of the Penal Law (10).

When questioned, the defendant said that he was not the person who created the works exhibited in the gallery; however, he received a commission for their sale (10, 33-4).

Each of the objects in which the American flag appeared was photographed (19). These photographs were received in evidence as People's Exhibits 1 through 9 (11-16).

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* References are to the state Record on Appeal, to page numbers which appear at the foot of each page.

The Defendant's Case

Stephen Radich, the defendant, testified that he is the sole proprietor of an art gallery located at 818 Madison Avenue; he owned the gallery for seven years (70-1, 90). On December 27th and 28th, 1966, he exhibited, in his gallery, thirteen works by Marc Morrel (73). The gallery was open to the public, there was no admission charge, and brochures were sent out to publicize the exhibit (73-4, 90-1; Defendant's Exh. B).

All of Morrel's works were for sale. There was a set price list and Morrel's works ranged in price from $250 to $1200. By an arrangement with Morrel Radich's commission for a sale was thirty-three and one-third per cent (77, 81, 91). He sold one work for $900 and accordingly received a commission of $300 (91).

Radich considered Morrel's work to be protest art (79). In his opinion, the works protested war; destruction; certain societies; injustices in this country; and infringement upon the freedom of speech (79-80). During the exhibit "war protest songs" were played on a tape recorder (76-7). In exhibiting Morrel's works, he did not intend to be contemptuous of the flag of the United States (80). He "displayed them because they were works of art, and because [like] all other works of art in the gallery they were for sale" (101-2).

One of Morrel's works [People's Exhibits 3 and 4] was a cross from which protruded the American flag, formed in the likeness of a human penis; tassels at the base of the cross were "probably a decorative or pubic hair" (92-5).

Church flags were draped over the cross's horizontal and vertical pieces. In the defendant's opinion, the message imparted by this sculpture was that there is no separation of church and state; that this government is involved in aggressive acts of war (96). The church flags indicated that the organized church either supports, leads or is being led by acts of aggression (96). The work was priced at $1200, but was not sold (96-7). In his view, the artist was not being disrespectful toward the flag; he thought Morrel questioned the behavior of the government and organized religion in aggressive acts of war (98).

Another of Morrel's works, which hung in his gallery's window, was made up of an American flag in the form of a body, suspended by a hangman's noose [People's Exhibit 2]. In the defendant's opinion, this sculpture illustrated Morrel's doubt whether the people of the United States are enjoying their constitutional rights (99, 101).

Hilton Kramer, art news editor of the *New York Times*, qualified as an expert witness after recounting his background in the field of art (107, 112). In his opinion, "there is virtually no material which contemporary artists are not applying in some form or other * * * in a work of art" (112-3). He "would define a work of visual art as any physical object specifically whose visual properties [are] specifically designed to communicate an aesthetic emotion" (113); and "anything specifically designed to be a work of art, whether it's poor or high quality, is a work of art" (124).

In the course of his newspaper responsibilities, Kramer received an announcement [Defendant's Exh. B] of the

Morrel exhibit at the Radich Gallery, and in December 1966 he saw the exhibit at the gallery (108, 113). In accord with his definition of art he considered Morrel's works art, and a "rather feeble" form of protest art (118-19, 123); he also described Morrel's works as "ornamental sculpture" (122). Though he was aware that Morrel intended to render some anti-war message, no political message was conveyed to him (125-8).

ARGUMENT

I

Conduct that casts contempt upon the American flag is not protected by the First Amendment guarantee of freedom of speech.

Appellant Stephen Radich was convicted for committing an act by which he defiled and cast contempt upon the American flag; he was not convicted for any verbal expression against the government or the flag, or for any expression of opposition to the government or its policies which his act may be deemed to have conveyed.

For Radich chose to exhibit publicly in his art gallery certain so-called sculptures which employed the American flag in a contemptuous manner: One sculpture used the American flag to depict a male penis and attached the penis to a cross draped with church flags; another sculpture, which was in the window of the gallery and visible from the street, used the flag to depict a human body hanging by the neck from a noose.

While Radich considered these items to be protest art, Radich himself had not constructed the items and was not

himself apparently seeking to communicate social protest by these works; his interest appeared primarily commercial: to exhibit what he considered art for the purpose of sale, his commission being one-third the selling price. And, while the art news editor of the *New York Times* considered the items protest art, the items conveyed no political message to him.

In any event, the First Amendment does not accord a nonverbal act which seeks to express an idea, as many or most acts do, the same protection afforded a verbal expression of an idea. *Cox* v. *Louisiana,* 379 U.S. 536, 555 (1965); *Adderley* v. *Florida,* 385 U.S. 39 (1966); *United States* v. *O'Brien,* 391 U.S. 367 (1968). The First Amendment protects "speech" and "the press"; an actual flag in the form of a male sexual organ, or a hanging effigy, is neither "speech" nor "the press."

Consequently, since, as we shall demonstrate, a "sufficiently important governmental interest" and power exists in prohibiting *conduct* contemptuous of the flag and since "the governmental interest is unrelated to the suppression of free expression," then—even if the conduct included expressive elements—"incidental limitations" on the latter were justified. *United States* v. *O'Brien, supra,* at 376-7.

That there exists a "sufficiently important governmental interest" and power in prohibiting conduct which treats the American flag contemptuously, was made evident by this Court in *Halter* v. *Nebraska,* 205 U.S. 34, 41-2 (1907):

> "From the earliest periods in the history of the human race, banners, standards and ensigns have been

> adopted as symbols of the power and history of the peoples who bore them * * * *Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot.*
>
> "* * * Therefore a State will be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige, and will be impatient if any open disrespect is shown towards it" (emphasis added).

In short, as the New York Court of Appeals held, the flag desecration statute promotes the important governmental interest of preventing "the outbreak of * * * violence by discouraging contemptuous and insulting treatment of the flag in public." *People* v. *Radich,* 26 N.Y.2d 114, 119 (1970); *People* v. *Street,* 20 N.Y.2d 231, 236 (1967), *rev'd. on other gds.* 394 U.S. 576 (1969); *see also, People* v. *Cogwill,* 78 Cal. Rptr. 853 (Cal. App. 1969), *app. dism.* —— U.S. —— (1970); *Hoffman* v. *United States,* 256 A.2d 567 (Ct. of App., D.C. 1969); *State* v. *Schlueter,* 23 A.2d 249 (N.J. 1941). That no actual violence may occur in a particular case, such as the present one, is a fortuitous circumstance that hardly negates the proposition that contemptuous use of the flag in public can be the occasion for violence and that the state can proscribe conduct that potentially breeds violence without waiting until the violence is actually occasioned. Radich had exhibited in his window, for the public to view, an actual American flag being hung in effigy. The state, seeking to avoid violence by prohibiting conduct contemptuous of the flag, did not have to wait until members of the public broke Radich's window or destroyed his studio and possibly in the process injured him or innocent bystanders.

It is equally clear that the governmental purpose envisioned by the statute is "unrelated to the suppression of free expression." Acts contemptuous of the flag regardless of whether they are designed to express views are punishable [*see, e.g. People* v. *Cogwill, supra*], just as destruction of draft cards regardless of whether the destruction was "engaged in for the purpose of expressing views" is punishable. *United States* v. *O'Brien, supra,* at 375. The instant statute is neutral as to political expression—a disappointed "hawk" expressing by similar uses of the flag his contempt for American appeasement of "communism" would also be covered by the statute. Similarly, the criminal complaint in this case, and the People's evidence, made no mention of expression or political views; only conduct was referred to. The "expressive" qualities alleged were brought by appellant as a matter of defense. *Compare Street* v. *New York,* 394 U.S. 576 (1969). And, while acts contemptuous of the flag are justifiably prohibited, the citizen remains free verbally "to express publicly [his] opinions about our flag [or the draft], including those opinions which are defiant or contemptuous." *Street* v. *New York, supra,* at 593. Accordingly, the instant statute is distinguishable from those statutes or administrative regulations whose object was either to suppress communication [*Stromberg* v. *California,* 283 U.S. 359 (1931) (prohibiting people from expressing their opposition to government by the display of a red flag); *Tinker* v. *Des Moines,* 393 U.S. 503 (1969) (prohibiting students from expressing their opposition to the Vietnam war by the wearing of black arm bands); *Schacht* v. *United States,* —— U.S. —— (1970) (prohibiting people from "speaking out against the role of our Army and our country in Vietnam")] or to "com-

pel'' an individual ''to utter what is not in his mind.'' *West Virginia* v. *Barnette,* 319 U.S. 624, 634 (1943) (compulsory flag salute).

Further, that the statute prohibiting defilement and casting contempt upon the flag is not unconstitutionally vague, and that the exhibited works fall within the statutory proscriptions, cannot be doubted. A criminal statute is not void for vagueness if ''men of common intelligence'' are not ''required to guess at the meaning of the enactment.'' *Winters* v. *New York,* 333 U.S. 507, 515 (1948). Fair, reasonable notice of the acts proscribed in terms readily understandable by men of average intelligence is required, not mathematical precision. Indeed, this Court

> ''has consistently held that lack of precision is not itself offensive to the requirements of due process. The Constitution does not require impossible standards, all that is required is that the language conveys sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices. * * * That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense.'' *Roth* v. *United States,* 354 U.S. 476, 491-2 (1957).

Thus, men of ordinary intelligence would be able to understand what conduct ''casts contempt'' upon the American flag. And if using the flag for purposes of advertisement on a bottle of beer ''tends to degrade and cheapen the flag in the estimation of the people, as well as to defeat the object of maintaining it as an emblem of National power and National honor'' [*Halter* v. *Nebraska,*

supra, at 42], certainly, hanging the flag in effigy and using it to form a male penis cast contempt upon the flag. And no man of common intelligence could think otherwise. The knowing display of such objects need not be excused because the exhibitor's specific intent is other than contemptuous. The statute is properly malum prohibitum; the defendant is held to the natural consequences of his deliberate knowing act of exhibiting items whose subject he was aware of and which were found contemptuous of the flag. In *Smith* v. *California,* 361 U.S. 147 (1959), upon which appellant relies, the state was prohibiting from punishing a proprietor of a bookstore for exhibiting items whose subject matter he was unaware of. If the bookseller had been aware of the contents of the items, his subjective opinion that they were not obscene would have been immaterial. Moreover, the scienter requirement of *Smith*—liberally applied in New York to books and other products of the "press" [*People* v. *Finkelstein,* 9 N.Y.2d 342 (1962)]—has no application to conduct.

II

The statutory exception which permits certain uses of the flag in a non-contemptuous manner and disconnected from advertisement does not deny appellant equal protection.

Finally, Radich claims that the statute denies him equal protection, based on his erroneous reading of an exception contained in the statute:

> "This subdivision shall not apply to any act expressly permitted by the statutes of the United States

> of America, or by the United States army and navy regulations, nor shall it be construed to apply to a certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, stationery for private use in correspondence, or newspaper or periodical, on any of which shall be printed, painted or placed, said flag, standard, color, shield or ensign disconnected and apart from any advertisement."

Radich attempts to argue that this provision of the statute permits people to use the flag contemptuously on "ornamental pictures * * * or newspaper, or periodical" and thus denies him equal protection when it forbids him to use the flag contemptuously on ornamental sculpture. Read in the context of the entire statute, the major portion of which seeks to prohibit the use of the flag in advertisements, it is quite clear that the exception is intended to permit only non-contemptuous use of the flag for certain purposes, when such use is "disconnected and apart from any advertisement." Indeed, this Court in *Halter* v. *Nebraska, supra,* interpreted the exception as not applying to contemptuous use:

> "It was for the State of Nebraska to say how far it would go by way of legislation for the protection of the flag against improper use—taking care, in such legislation, not to make undue discrimination against a part of its people. It chose not to forbid the use of the flag for the exceptional purposes specified in the statute, prescribing the fundamental condition that its use for any of those purposes should be 'disconnected from any advertisement.' All are alike forbidden to use the flag as an advertisement. It is easy to be seen how a representation of the flag may be wholly disconnected from an advertisement and be used upon a newspaper, periodical, book, etc., in such way as not to

arouse a feeling of indignation nor offend the sentiments and feelings of those who reverence it. In any event, the classification made by the State cannot be regarded as unreasonable or arbitrary or as bringing the statute under condemnation as denying the equal protection of the laws'' [*id.* at 45].

Since Radich has been convicted of using the flag contemptuously, the exemption provision is not here in issue.

Thus, appellant's argument as to equal protection not only fails to present a substantial federal question, but it it based on a construction of the statute which has not been announced by the New York courts. There is no authority that non-contemptuous use of the flag in ornamental art, in the form of ''sculpture,'' would not be protected by the exemption for ''ornamental pictures.'' In the absence of such authority, the issue sought to be raised here is not properly presented for review.

Conclusion

The appeal should be dismissed or the judgment below affirmed.

Respectfully submitted,

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June, 1970

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SUPREME COURT, U. S.

DEC 3 1970

E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

No. 169

STEPHEN RADICH,

Appellant,

VS.

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Statute Involved	2
Questions Presented	3
Statement of the Case	4
Summary of Argument	6
I. Appellant's Conviction Violates the First Amendment Guaranty of Freedom of Speech	7
A. "Casting Contempt" Means to Communicate an Idea or Attitude; a Statute That Bans Such Communication Is Unconstitutional	7
B. The First Amendment Prohibits Punishment for Exhibition of Sculpture on the Ground That It Has Been Found to Be Contemptuous of the Flag	9
II. The Only Governmental Interest Furthered by the Flag Desecration Statute Is Respect for the Flag, Which Cannot Be Furthered Without Violating the First Amendment	14
III. New York's Flag Desecration Statute Is Unconstitutional on Its Face Because It Is Unclear, Uncertain and Overbroad in Violation of the Fourteenth Amendment	21

PAGE

IV. The Equal Protection Clause of the Fourteenth Amendment Bars the Conviction of Appellant for Displaying Sculpture in an Art Gallery Under a Statute Which Permits Newspaper and Magazine Publishers to Show Photographs of That sculpture in Their Publications and Permits Exhibition of Paintings on the Same Theme 27

CONCLUSION 28

TABLE OF AUTHORITIES

Cases Cited:

Bachellar v. Maryland, 397 U.S. 564 (1970) 20

Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942) 16
Connally, Commissioner v. General Construction Company, 269 U.S. 385 (1926) 24
Cox v. Louisiana, 379 U.S. 536 (1965) 20, 24

Edwards v. South Carolina, 372 U.S. 229 (1963) 20

Feiner v. New York, 340 U.S. 315 (195) 16
Frain v. Baron, 307 F.Supp. 27 (E.D.N.Y. 1970) 14

Halter v. Nebraska, 205 U.S. 34 (1907) 14
Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966) 27
Hodsdon v. Buckson, 310 F.Supp. 528 (D.Del. 1970) 9, 13, 14, 26

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-502 (1952) 10, 21

Kunz v. New York, 340 U.S. 290 (1951) 24

PAGE

Lanzetta v. New Jersey, 306 U.S. 451 (1939) 23
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NAACP v. Button, 371 U.S. 415 (1963) 23, 26
N.Y. Times v. Sullivan, 376 U.S. 254 (1964) 10

People v. Hubner 25n
People v. Pregaskis 25n
People v. Radich, 53 Misc.2d 717, 279 NYS2d 680 (New York Criminal Court, 1967) 7, 8, 9, 10, 11, 19, 21, 23

Roth v. United States, 354 U.S. 476, 487 (1957) 10

Scales v. United States, 367 U.S. 203 (1961) 24
Schacht v. United States, 398 U.S. 58 (1970) 12
Smith v. California, 361 U.S. 147 (1959) 24
Staub v. City of Baxley, 355 U.S. 313 (1958) 24
Street v. New York, 394 U.S. 576 (1969) 9, 14, 15, 17, 18, 20
Stromberg v. California, 283 U.S. 359 (1931) 9, 13, 14, 18

Terminiello v. Chicago, 337 U.S. 1 (1949) 16, 20
Tinker v. Des Moines, 393 U.S. 503 (1969) 9, 13, 14, 16, 17, 20
Thornhill v. Alabama, 310 U.S. 88 (1940) 24
United States v. O'Brien, 391 U.S. 367 (1968) 20

West Virginia v. Barnette, 319 U.S. 624 (1943) 14, 18

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 27

PAGE

Statutes Cited:

Penal Law, New York, Section 1425, Subd. 16 (Now Gen. Bus. Law, Section 136) 2, 4, 16, 18, 19
Penal Law, New York, Section 240.20 9
General Business Law, Article 9B, Section 136 19

28 U.S.C. §1257(2) 2

U.S. Constitution:

First Amendment 3, 4, 7, 10, 12, 13, 15, 16, 19, 24, 26, 27

Fourteenth Amendment 4, 21, 27

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Shikes, The Indignant Eye: The Artist as Social Critic (Boston, 1969, Intro. p. xxiii) 10

Render Unto Caesar: The Flag Salute Controversy (Univ. of Chicago Press 1962) 14

Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970) 26

Note, *Freedom of Speech-Desecration of National Symbols as Protected Political Expression*, 66 Mich. L. Rev. 1040 (1968) 14

PAGE

Note, *Freedom of Speech and Symbolic Conduct: The Crime of Flag Desecration*, 12 Ariz. L. Rev. 71 (1970) 14

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Amsterdam, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. of Pa. Law Review 67 (1960) 26

IN THE

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STEPHEN RADICH,

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PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
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BRIEF FOR APPELLANT

Opinions Below

The opinion of the Court of Appeals of the State of New York (A 6a-17a),* and the dissenting opinion of Chief Judge Fuld (A 18a-22a), are reported at 26 N.Y. 2d 114 (1970), 308 NYS 2d 846 (1970). The opinion of the Criminal Court of the City of New York, New York County (A 25a-30a) and the dissenting opinion of Judge Amos Basel (A 31a-36a) are reported at 53 Misc.2d 717, 279 NYS2d 680. The Appellate Term, First Judicial Department of the Supreme Court of the State of New York affirmed without opinion, which affirmance is reported at 57 Misc.2d 1082, 294 NYS2d 285.

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* All page references are to Appellant's Appendix.

Jurisdiction

The order of the Court of Appeals was entered on February 18, 1970. The Jurisdictional Statement was filed May 18, 1970 and probable jurisdiction was noted on October 19, 1970. This court has jurisdiction under 28 U.S.C. § 1257(2).

Statute Involved

Section 1425, Penal Law of New York, subdivision 16 (now General Business Law, Section 136):

16. Any person who

a. In any manner for exhibition or display, shall place or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement, of any nature upon any flag, standard, color, shield or ensign of the United States of America, or the state of New York, or shall expose or cause to be exposed to public view any such flag, standard, color, shield or ensign, upon which after the first day of September, nineteen hundred and five, shall have been printed, painted or otherwise placed, or to which shall be attached, appended, affixed or annexed, any word, figure, mark, picture, design, or drawing, or any advertisement of any nature, or

* * * * *

d. Shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act, or

* * * * *

f. Shall publicly carry or display any emblem, placard or flag which casts contempt, either by word or act, upon the flag of the United States of America

* * * * *

Shall be guilty of a misdemeanor.

The words flag, standard, color, shield or ensign, as used in this section, shall include any flag, standard, color, shield or ensign, or any picture or representation, of either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of, said flag, standard, color, shield or ensign, of the United States of America, or of the state of New York, or a picture or a representation, of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation, may believe the same to represent the flag, colors, standard, shield or ensign of the United States of America or of the state of New York.

This subdivision shall not apply to any act expressly permitted by the Statutes of the United States of America, or by the United States army and navy regulations, nor shall it be construed to apply to a certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, stationery for use in private correspondence, or newspaper or periodical, on any of which shall be printed, painted or placed, said flag, standard, color, shield or ensign disconnected and apart from any advertisement.

* * * * *

Questions Presented

1. Does the First Amendment to the United States Constitution permit the suppression of sculpture on the ground that it has been found to be contemptuous of our national symbol?

2. Does the statute under which appellant was convicted further any governmental interest other than compelling veneration for the flag, and is the interest which is furthered by the statute unrelated to the suppression of free speech?

3. Is the prohibition against casting contempt upon the flag in the statute under which appellant was convicted sufficiently clear, certain and limited to meet the requirements of the First and Fourteenth Amendments?

4. Does the equal protection clause of the Fourteenth Amendment bar the conviction of appellant for displaying sculpture in an art gallery under a statute which permits magazine and newspaper publishers to show photographs of that sculpture in their publications and permits exhibition of paintings on the same theme?

Statement of the Case

The Trial Court found that appellant cast contempt on the American flag by exhibiting in his art gallery certain sculptures utilizing American flags or what appeared to be American flags (A 27a; 30a). He therefore was convicted of violating subdivision 16d. of Section 1425 of the Penal Law of New York (currently Section 136(d) of the General Business Law) which makes it a misdemeanor to cast contempt upon the flag of the United States of America, or any picture or representation of the flag. He was sentenced to pay a fine of $500 or in lieu thereof to serve 60 days in the Workhouse (A 122a).

The sculptures, called constructions, had been created by an artist named Marc Morrel, and were exhibited in appellant's Madison Avenue art gallery, which had customarily exhibited one-man shows of sculpture (A 76a-78a; 104a).

Shortly after the Morrel exhibition opened, appellant was served with a summons in his gallery by a police officer (A 40a). At the trial, the complaining police officer testified that, from Madison Avenue, he had observed one of the sculptures—what appeared to him to be the flag in the shape of a human body hanging from a yellow noose—in the window of appellant's second floor gallery (A 40a); that he had seen that sculpture and others when he entered the gallery with a police photographer who photographed the works (A 40a) (the photographs were introduced into evidence as People's Exhibits 1-9); that appellant and one other person were present (A 45a); and that anti-war music was being played (A 80a). There was no testimony of disturbance or disorder or circumstances which might lead to disorder.[1]

Two witnesses, appellant (A 76a) and the Art News Editor of the New York Times, Mr. Hilton Kramer (A 98a) testified for the defense. As experts in the art field (A 77a; 98a-99a), they stated their opinion that the sculptures or constructions were art (A 80a-81a; 104a)—a form of protest art in the tradition followed by Goya, Michelangelo and Picasso (A 81a). Appellant also testified that he did not intend to express contempt for the flag by exhibiting the sculpture (A 82a). Both witnesses testified that contemporary artists use many unconventional materials and frequently mix materials, so that there is today no distinct line between sculpture and painting (A 77a; 101a).

Appellant was tried by a three-judge court which found (Basel, J., dissenting) that appellant had "cast contempt"

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[1] The sculpture observed by the police officer, consisting of the flag hanging from a noose, was the only Morrel sculpture visible from the street (A 40a). In order to view the remaining Morrel works, the arresting officer entered the building, climbed to the second floor and entered appellant's gallery (A 45a).

upon the flag by exhibiting the sculpture (A 27a; 30a). The conviction was affirmed by the Appellate Term, New York County, of the Supreme Court of the State of New York and by the Court of Appeals of the State of New York. The execution of appellant's sentence of a $500 fine or 60 days in jail has been stayed pending appeal.

Summary of Argument

The New York Court of Appeals has construed the statute at issue herein to outlaw all sculpture utilizing the American flag which a reasonable man would believe "dishonored" the flag, regardless of whether the artist or exhibitor actually intended to cast contempt upon the flag and regardless of whether any danger of a breach of the peace actually existed as a result of the exhibition.

Under our system of government, it cannot be a crime for a citizen to cast contempt upon any symbol of government. Since casting contempt inevitably involves the communication of an idea, it cannot be made criminal.

The expression of political or purely aesthetic themes by means of art forms is a traditional method of communication meriting plenary constitutional protection. There is no justification for distinguishing between verbal communication and sculpture in terms of the constitutional protection afforded to each.

The statute in question permits the use of the flag for the dissemination of orthodox political views, but renders criminal its use to criticize current governmental policy. Statutes which permit Americans to praise their government, but prohibit them from criticizing it are unconstitutional.

The statute in question, as construed by the Court below, furthers no governmental interest other than veneration

for the flag. Respect for the flag cannot be compelled in a free society.

The statute in question violates the void-for-vagueness and overbreadth doctrines enunciated by this Court because a) it is so vague and imprecise as to fail to apprise the public of the scope of its proscription; b) it fails to provide local officials with adequate standards for enforcement; c) constitutionally protected conduct may be swept within its ambit and d) it has been construed to create a "strict liability" offense in the area of the First Amendment.

Finally, the statute erects wholly irrational distinctions among photographs, ornamental pictures and sculpture.

I.

Appellant's Conviction Violates the First Amendment Guaranty of Freedom of Speech.

A. "Casting Contempt" Means to Communicate an Idea or Attitude; a Statute That Bans Such Communication Is Unconstitutional.

Appellant was convicted under a clause of the statute which makes it a crime publicly to cast contempt upon the flag. Although the same subdivision of the statute, (d), also prohibits mutilation, defacement, defilement and trampling upon the flag and another subdivision, (a), bars the placing of words, marks, pictures or emblems upon the flag, appellant's conviction does not involve any of these.

Appellant was convicted expressly for casting contempt on the flag. *People* v. *Radich,* 53 Misc. 2d 717, 279 NYS 2d 680 (New York Criminal Court, 1967) (A 27a). In other

words he was convicted for exhibiting scorn or disdain[2] for the flag; for communicating an idea or an attitude.

By lumping "casting contempt" with mutilation and defacement, the statute obfuscates the purely communicative meaning of casting contempt. If one of the synonyms for contempt—disdain or scorn—were substituted for it in the statute, the unconstitutionality of the prohibition would be more immediately obvious.[3] Perhaps because of the legal concept of contempt of court and legislative bodies, use of the word "contempt" in the flag statute obscures the fact that what the flag statute purports to ban is the simple communication of an idea. Contempt of court or of a legislative body involves an entirely different concept.[4]

It must be conceded that the purpose of the New York statute is to prevent the flag from being profaned, i.e., to require it to be treated as a sacred object. Indeed, the New York Court of Appeals referred to it as *"the flag desecration statute"* (A 9a); 26 N.Y. 2d at 123. (Emphasis added) In seeking to justify it, the Court stated that there was a discernible legislative purpose to prevent a breach of the peace "regardless of the major motivating factor

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[2] "Syn. (noun) 1. Scorn, disdain, and contempt denote feelings directed toward that which we regard as base or repellent. Scorn is the mildest term; it may be shown simply by avoidance of the unworthy. Disdain suggests a more overt expression, as shown by the proud or haughty rejection of that which offends. We may show scorn or disdain toward something we find repellent or uninteresting; contempt always implies the passing of an adverse moral judgment upon another person or thing. Ant. regard, approval, appreciation." (Funk and Wagnall's Standard College Dictionary (1963)).

[3] The only other prohibition against the attitude of contempt known to appellant is in the Uniform Code of Military Justice. Kester, *Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice*, 81 Harv. L. Rev. 1697 (1968).

[4] Goldfarb, The Contempt Power, 1963 p. 1.

behind its enactment." (A 9a; 26 N.Y. 2d at 124). The Court thus implicitly conceded that the major motivation for the statute was to prevent the flag from being profaned.

The true motivation can also be seen from the fact that New York has a disorderly conduct statute (N.Y. Penal Law § 240.20, at the time of this prosecution § 722), which serves the purpose of preventing breaches of the peace, and which encompasses conduct which causes public disturbances. "Any sensible construction of the first amendment would forbid a legislature to go out of its way to inhibit expression, either by design or accident, and the choice of the harsher of equally effective means suggests that suppression of speech was the legislature's real purpose from the start." Note, *Less Drastic Means and the First Amendment*. 78 Yale L.J. 464 (1969) at 469.

This Court has previously decided, in *Street* v. *New York*, 394 U.S. 576 (1969), that a state may not "constitutionally inflict criminal punishment upon one who ventures 'publicly [to] defy . . . or cast contempt upon [the American flag] by words . . .'." (Ibid, p. 590). Appellant believes that the communication of contempt for which he has been convicted is entitled to the same constitutional protection which this Court granted to Street's words. Cf. *Hodsdon* v. *Buckson*, 310 F.Supp. 528 (D.Del. 1970); *Tinker* v. *Des Moines*, 393 U.S. 503 (1969); *Stromberg* v. *California*, 283 U.S. 359 (1931).

B. The First Amendment Prohibits Punishment for Exhibition of Sculpture on the Ground That It Has Been Found to Be Contemptuous of the Flag.

It is important to note that we are dealing here with pure speech, not so-called symbolic speech. Painting and sculpture are "speech", as that term is used in the First Amendment, as much as words—indeed, the earliest form of writing was picture writing.

A work of art, whether it be a poem, a novel, a play, a painting, a cartoon drawing or a piece of sculpture is a form of expression protected by the First Amendment. *Roth* v. *United States,* 354 U.S. 476, 487 (1957). *Joseph Burstyn, Inc.,* v. *Wilson,* 343 U.S. 495, 501-502 (1952). Two and three dimensional art forms have, throughout history, expressed political ideas. Artists have traditionally raised their "voices" in social protest:

> "They have used the most effective weapon at their command—their art—to needle the Establishment, duel with oppressive governments, satirize corrupt or indifferent churches, strip bare the foul futility of war, attack exploitation, uncover the bleak existence of the poor, and in general to make visual comment on human folly in its infinite variations." Shikes, *The Indignant Eye: The Artist as Social Critic* (Boston, 1969, Introduction, p. xxiii).

Political ideas are given priority under our constitutional scheme. *N. Y. Times* v. *Sullivan,* 376 U.S. 254, (1964). The sculpture exhibited by appellant was protest art. Such art has expressed its creators' opposition to the institutions of every society even when banned by totalitarian regimes. Michelangelo protested against the church; Goya criticized the corruption of the Spanish monarchy; Daumier (misspelled Eudonia in the transcript) criticized judges, lawyers and the system of justice; Pablo Picasso in *Guernica* condemned the atrocities of the Spanish Civil War (A 81a).

The dissenting opinion in the Court of Appeals described the message communicated by the artistic work at issue here:

> "[T]he artist in the present case unquestionably made use of the flag for the purpose of expressing his political philosophy or views, his dissatisfaction with, and

> opposition to, the Vietnam War and other activities carried on by the Government. The challenged 'constructions' were, in effect, but three-dimensional political cartoons. . . .
>
> • • • • •
>
> "It is evident that the only reason why these works of Morrel were singled out for prosecution was not because the flag was used in the sculptures but solely because of the particular political message which those sculptures were intended to convey. In a very real sense, therefore, it was not the artist's *act* of making use of the flag which is being punished but solely the *protest* or the political views he was seeking to express thereby" (Dissenting Opinion of Fuld, Ch. J., 26 N. Y. 2d at 128) (A 21a). (Emphasis in Original.)

The statutory language used—casting contempt—precludes punishment for praising United States policy; the use of a flag motif to praise the Vietnam war will not violate that provision of the statute. The existence of the "casting contempt" language has, apparently, affected the application of the entire statute. The prohibitions in the statute against mutilating or marking the flag have been invoked against those using a peace symbol on the flag in opposition to the Vietnam war and, to counsel's knowledge, not against those marking the flag with words or symbols of support for the war or for political candidates supporting the war. Cf. *Long Island Vietnam Moratorium Committee* v. *William Cahn*, —— F. Supp. —— (E.D.N.Y. 1970), currently pending before United States Court of Appeals for the Second Circuit, No. 35287, argued November 12, 1970.

This Court has held that a statutory provision which leaves Americans free to praise the war in Vietnam, but can send them to prison for opposing it cannot constitu-

tionally be sustained. *Schacht* v. *United States,* 398 U.S. 58 (1970).

In *Schacht,* this Court considered a statute which authorized wearing the uniform of one of the armed forces in theatrical productions only "if the portrayal does not tend to discredit that armed force". Since wearing a military uniform without authorization is a crime, actors could perform in plays in uniform only if the performance did not criticize the conduct or policies of the military. In order to say whatever they wished, actors had to forego the uniform.

Schacht was convicted for wearing an army uniform in a skit which was part of an antiwar demonstration.[5] He contended that the statutory prohibition against the wearing of a military uniform in a play critical of the armed forces imposed an unconstitutional restraint on his right of free speech. Stating that a clause "which leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it, cannot survive in a country which has the First Amendment," this Court reversed the conviction and ordered the restrictive language struck from the statute.

The statutory clause struck by this Court in *Schacht* is similar to that at issue on this appeal. If Radich chose to exhibit sculpture employing flag themes, the sculpture could not appear to discredit the flag. He could, of course, choose to show only sculpture which did not refer to the flag, just as Schacht could have chosen to wear a a sign reading "U.S. soldier" instead of wearing a military uniform.

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[5] The art form employed by Schacht like that in the present case did not necessarily express its message by means of language. Although the skit for which Schacht was prosecuted involved some words, it is unlikely that the decision would have been different if it had been pantomime.

The First Amendment embraces the sculptures exhibited by appellant as well as the skit in which Schacht appeared. Insults to the military uniform may arouse as much resentment in some persons as insults to the flag, but no exception from the Constitutional mandate may be made for either.

In *Hodsdon* v. *Buckson*, 310 F. Supp. 528 (D. Del. 1970), a three judge United States District Court repudiated the concept that non-verbal communicative activity involving the flag was not entitled to the plenary protection of the First Amendment. Judge Seitz, writing for the Court, stated:

> "The crucial issue, therefore, is whether, although the state may not . . . punish words defiant or contemptuous of the flag, it may nevertheless punish acts which convey identical ideas.
>
> "Expression is not confined to the spoken and written word. A court may take judicial notice of the symbolic significance of particular acts. . . . Thus, although acts are not beyond regulation because they have symbolic components, in the absence of factors justifying limitation, symbolic speech is constitutionally protected." (310 F. Supp. at 533) (Footnotes omitted)

See also *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Stromberg* v. *California*, 283 U.S. 359 (1931).

The Delaware District Court, rejecting the notion that the state interest in preventing breaches of the peace justifies Delaware's flag statute (which is identical in all material respects to the New York statute at issue herein), declared the statute unconstitutionally overbroad.[6]

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[6] Appellant does not believe that the creation or exhibition of sculpture is "symbolic speech"; rather it is "pure speech," entitled

II.

The Only Governmental Interest Furthered by the Flag Desecration Statute Is Respect for the Flag, Which Cannot Be Furthered Without Violating the First Amendment.

Appellant was convicted because he "cast contempt" on the flag. The statute does not forbid the exhibition of sculpture; it forbids the message communicated by that sculpture. New York's statute, as applied by the court below, protects no state interest other than compelling veneration for the flag. Respect for the flag cannot be compelled in a free society. *West Virginia* v. *Barnette,* 319 U.S. 624 (1943); *Street* v. *New York,* 394 U.S. 576 (1969).

This case is yet another in a series of judicial explorations into the constitutional implications of state imposed flag veneration. *West Virginia* v. *Barnette,* 319 U.S. 624 (1943); *Street* v. *New York,* 394 U.S. 576 (1969); *Hodsdon* v. *Buckson,* 310 F. Supp. 528 (D. Del. 1970); *Frain* v. *Baron,* 307 F. Supp. 27 (EDNY 1970); *Halter* v. *Nebraska,* 205 U.S. 34 (1907). See generally, *Render Unto Caesar: The Flag Salute Controversy* (University of Chicago Press 1962); Note, *Freedom of Speech-Desecration of National Symbols as Protected Political Expression,* 66 Mich. L. Rev. 1040 (1968); Note, *Symbolic Conduct,* 68 Col. L. Rev. 1091 (1968); Note, *Freedom of Speech and Symbolic Conduct: The Crime of Flag Desecration,* 12 Ariz. L. Rev. 71 (1970).

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to maximum constitutional protection. Appellant believes this appeal to be governed by *Street* v. *New York, supra.* Even if, however, appellant's exhibition is viewed as symbolic conduct, the rationale of *Tinker* v. *Des Moines,* 393 U.S. 503 (1969); *Stromberg* v. *California,* 283 U.S. 359 (1931); and *Hodsdon* v. *Buckson,* 310 F. Supp. 528 (D. Del. 1970) would compel a reversal.

In each case, the underlying dilemma has been the extent to which a free society may compel respect or veneration for its flag. Appellant believes that in a free society no person should be compelled to make ritualistic obeisance to a trapping of the state, whether by being ordered to salute it, or by being coerced into observing a series of taboos concerning its use. The effect of either form of compulsion is to create a secular equivalent of a religious icon.

Paradoxically, our flag, as the emblem of a society of free men, must symbolize the right of free men to scorn it if their consciences so dictate.

In *Street* v. *New York*, *supra*, this Court identified four governmental interests which might have been furthered by punishing Street for his words and found that none of them justified his conviction.

Since the sculpture exhibited by appellant is a form of expression protected by the First Amendment, we examine those four governmental interests to see if they justify appellant's conviction here. They are: "(1) an interest in deterring appellant from vocally inciting others to commit unlawful acts; (2) an interest in preventing appellant from uttering words so inflammatory that they would provoke others to retaliate against him, thereby causing a breach of the peace; (3) an interest in protecting the sensibilities of passers-by who might be shocked by appellant's words about the American flag; and (4) an interest in assuring that appellant, regardless of the impact of his words upon others, showed proper respect for our national emblem." *Street* v. *State of New York*, 394 U.S. 576, at 591 (1969).

None of these interests constitutionally justify appellant's conviction for the same reasons that this Court ruled they could not justify Street's conviction.

First, appellant's exhibition did not incite an unlawful act and Section 1425, 16(d) (currently Section 136(d), General Business Law) does not purport to punish only such contemptuous expression as amounts to incitement.

Second, a conviction cannot be justified because of the possible tendency of appellant's expression to provoke violent retaliation; the exhibition in a second floor gallery devoted to art works is not so inherently inflammatory as to constitute "fighting words", and the statute is not narrowly drawn to punish only words which are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 574 (1942).

The New York Court of Appeals has construed the statute as creating a heckler's veto even where there are no hecklers. The court below has in effect ruled that casting contempt on the flag in public creates an irrebuttable presumption that a breach of the peace will follow. Appellant submits that such a presumption is inconsistent with the Constitution.

The legislative determination in advance that all "contemptuous" flag usage is illegal, without regard to the actual imminence of public disorder, constitutes governmental regulation of speech so broad that it violates *Chaplinsky.*

Even where the danger of a breach of the peace is demonstrated, speech may not be prohibited if other methods are available to prevent a breach of the peace. Compare, *Terminiello* v. *Chicago,* 337 U.S. 1 (1949) with *Feiner* v. *New York,* 340 U.S. 315 (1951). The mere fact that a given expression of opinion may displease onlookers and even rouse them to anger does not justify a blanket prohibition upon such expression. The First Amendment does not

permit such a heckler's veto. *Tinker* v. *Des Moines,* 393 U.S. 503 (1969).

Appellant's conviction cannot be sustained on the third ground. "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street* v. *State of New York,* 394 U.S. at 592.

With respect to the fourth ground, the Supreme Court stated:

> "Finally, such a conviction could not be supported on the theory that by making the above-quoted remarks about the flag appellant failed to show the respect for our national symbol which may properly be demanded of every citizen. In *West Virginia State Board of Educ.* v. *Barnette,* 319 U.S. 624 (1943), this Court held that to require unwilling schoolchildren to salute the flag would violate rights of free expression assured by the Fourteenth Amendment. In his opinion for the Court, Mr. Justice Jackson wrote words which are especially apposite here:
>
> > 'The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate social organization. . . . (F)reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
> >
> > 'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can

prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.' Id., at 641-642. (Footnote omitted.)

"We have no doubt that the constitutionally guaranteed 'freedom to be intellectually . . . diverse and even contrary,' and the 'right to differ as to things that touch the heart of the existing order,' encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous." *Street* v. *State of New York*, 394 U.S. at p. 593.

The Court below attempted to distinguish this case from *Barnette* and from *Stromberg* v. *California*, 283 U.S. 359 (1931):

"However, the statutes prohibiting certain kinds of exhibition of foreign flags, and statutes requiring the salute to our flag (Cf. *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624) are clearly designed for no other purpose than communicative suppression whereas a flag desecration statute is aimed at keeping the peace." 26 N.Y. 2d at 124.

There is nothing in the design of the statute to support the distinction; the statute in *Stromberg* could have been justified on the same ground. New York's flag desecration statute is not phrased, and has not been construed, to require a finding of public disturbance, or an imminent breach of the peace.[7]

[7] The statute under which appellant was convicted was entitled "Malicious Injury to and Destruction of Property"; its 15 other

If preserving the public peace was the primary objective in prosecuting appellant, he could have been charged under New York's disorderly conduct statute. However, a conviction under that statute could not have been sustained. The testimony indicated no disorder (A 44a-45a). The exhibition in question occurred in the quiet surroundings of a second floor art gallery in midtown Manhattan. It is difficult to conceive of a forum within which the expression of ideas would be less likely to lead to a breach of the peace. As Chief Judge Fuld stated:

> ". . . I do not understand how it may reasonably be said that the mere display of Morrel's constructions in an art gallery, distasteful though they may be, poses the type of threat to public order necessary to render such an act criminal. This prosecution, in my view, is nothing more than political censorship falling far outside our holding in *People* v. *Street,* and may not be constitutionally sustained." (A 22a); 26 N.Y.2d at 129.

To deny, as has the Court below, plenary constitutional protection to protest art because its subject is the flag, is to narrow the protection of the First Amendment to those ideas approved by the majority. Nevertheless, the Court of Appeals of the State of New York has affirmed appellant's conviction for publicly expressing opinions by means of flag sculpture on the ground that the art work invited its audience "to join in the protest, or in counter-protest, with the consequent potential of public disorder." (A 10a); 26 N.Y.2d 119.

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subdivisions included such conduct as cutting down other people's timber, skating on a commercial ice pond and taking another's oysters; it is now codified under Article 9B of the General Business Law entitled "Uses of Names and Symbols" as Section 136 "Exhibition or Display of the Flag." The codifiers have apparently not recognized it to be a disorderly conduct statute.

A potentially hostile audience cannot serve to change the expression of ideas to criminal conduct. *Tinker* v. *Des Moines,* 393 U.S. 503 (1969); *Terminiello* v. *Chicago,* 337 U.S. 1 (1949); *Edwards* v. *South Carolina,* 372 U.S. 229 (1963); *Cox* v. *Louisiana,* 379 U.S. 536 (1965); *Bachellar* v. *Maryland,* 397 U.S. 564 (1970). Further, there was no evidence of any potentially hostile audience.

As this Court stated in *Tinker* v. *Des Moines Independent School Dist., supra,* in holding unconstitutional a ban against black armbands worn as an expression of opposition to the Vietnam War:

> ". . . in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken . . . that deviates from the view of another may start an argument or cause a disturbance. But our Constitution says we must take this risk. *Terminiello* v. *Chicago,* 337 U.S. 1 (1949)." 393 U.S. at 508.

The rationalization of the Court of Appeals finds no support in *United States* v. *O'Brien,* 391 U.S. 367 (1968). The governmental interest furthered by the statute prohibiting draft card burning was held to be preservation of draft cards to facilitate administration of the draft. The same kind of analysis of the flag desecration statute would show that the governmental interest furthered by the flag desecration statute is respect for the flag, not insuring public peace.

Finally, it should be noted that the dissenting opinions in *Street* lend no support for sustaining appellant's conviction. Chief Justice Warren, Mr. Justice Black and Mr.

Justice White rejected the majority's finding that Street's words might have been the basis for his conviction. They concluded that Street was convicted for burning an American flag, a mutilation prohibited by the statute. Street claimed constitutional protection because his act was a means of expressing his dissatisfaction with the social conditions within our country, not because it was in itself a constitutionally protected form of expression, as is the sculpture which was the basis of appellant's conviction.

III.

New York's Flag Desecration Statute Is Unconstitutional on Its Face Because It Is Unclear, Uncertain and Overbroad in Violation of the Fourteenth Amendment.

Appellant has been found guilty under a statute which makes it a crime to "cast contempt" upon the flag. This standard for criminality is entirely inadequate to meet the constitutional requirements which have been established by this Court.

As Judge Basel noted, dissenting at trial, conduct which one person deems respectful, another can find defiant or contemptuous. In view of the fact that the 100,000 people who paraded to the U. N. headquarters in New York on April 15, 1967 were critical of the uses to which the flag was being put in Vietnam, he suggested that if they were Radich's judges, it is doubtful they would have found his exhibition of these sculptures contemptuous; while if those who hurled insults at the parade were his judges, they would almost certainly have found him guilty. (A 32a); 279 NYS 2d at 688-689.

In *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495 (1952), a ban on "sacrilegious" motion pictures was approved by

the New York Court of Appeals. In reversing, this Court said:

> "New York's highest court says there is 'nothing mysterious' about the statutory provision applied in this case: 'It is simply this: that no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule. . . .' This is far from the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society. In seeking to apply the broad and all-inclusive definition of 'sacrilegious' given by the New York courts, the censor is set adrift upon a boundless sea and a myriad of conflicting currents of religious views . . ." 343 U.S. at 504-505.

The criterion established by the statute in *Burstyn* was whether a religious theme was treated in such a manner as to offend the religious beliefs of any group of persons. The criterion established by the flag desecration statute—whether a political symbol is treated in such a manner as to offend the political beliefs of any group or person—is equally vague and offensive under our Constitution.

The very definition of what constitutes a flag leaves the determination of whether or not a crime has been committed to the subjective reaction of any non-deliberative onlooker. The statute defines a flag as anything "of any substance, or represented on any substance, and of any size, evidently purporting to be, either of, said flag, standard, color, shield or ensign, of the United States of America, or of the state of New York, or a picture or a representation of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, *or by which the person seeing the same, without*

deliberation may believe the same to represent the flag, colors, standard, shield or ensign of the United States of America, or of the state of New York." (Emphasis added.)

In *Long Island Vietnam Moratorium Committee* v. *Cahn, supra,* a three judge court was unable to agree on the threshold issue of whether the symbol prosecuted in that case constituted a flag under the New York statute. If three judges could not agree on what constitutes a flag under the statute, how can the average citizen understand the scope of the statute?

Governmental regulations which fail to apprise the public of the scope of their proscriptions violate the Fourteenth Amendment, e.g., *Lanzetta* v. *New Jersey,* 306 U.S. 451 (1939). The uncertainty inherent in the statute under which appellant was convicted is particularly disturbing because it affects communication. The decision of the trial court below illustrates the danger in permitting such imprecise statutes. The majority opinion states:

> "If he [the defendant] wishes to approach the brink of what is proscribed he necessarily gambles on an adverse finding by the court." (A 30a); 279 N.Y.S. 2d at 685.

However, it is entirely contrary to the holdings of this Court to require a person to "gamble" on whether a particular form of expression is or is not permitted. To require such a "gamble" inevitably inhibits free expression. E.g., *Smith* v. *California,* 361 U.S. 147 (1959) at 151; *NAACP* v. *Button,* 371 U.S. 415 (1963), at 432-433.

As applied in this case, the chilling effect upon the free dissemination of ideas of the vague statutory language is enhanced by the fact that the statute has been construed to require no finding of appellant's intent to cast contempt upon the flag.

Appellant testified that he did not intend to cast contempt upon the flag by exhibiting the sculpture (A 82a) and that in fact he thought the artist might be expressing, not contempt for the flag, but contempt for those who were using the flag for aggressive purposes. The trial court held no intent to violate the statute was required for conviction (A 30a). The Court of Appeals specifically affirmed that holding: ". . . but even if we assume that defendant had an honest political intent in exhibiting these constructions, or that he had no intent at all, that element is not essential to a conviction of violating a statute which is *malum prohibitum*" (A 17a); 26 N.Y. 2d at 125.

Intent is a necessary element for a conviction in all cases involving the First Amendment. *Smith* v. *California,* 361 U.S. 147 (1959); *Scales* v. *United States,* 367 U.S. 203 (1961). As Chief Judge Fuld said in his dissent in this case: ". . . Although it is true that intent need not be an element of a crime—providing it is considered *malum prohibitum*—this is not the case where the challenged conduct involves the expression of political views". (A 21a-22a); 26 N.Y. 2d at 128 (1970).

A second basic policy underlying the "void for vagueness" doctrine is that no governmental regulation, especially in the First Amendment area, may vest an official with discretion to determine whether or not given conduct falls within its purview. E.g., *Connally, Commissioner* v. *General Construction Company,* 269 U.S. 385 (1926); *Cox* v. *Louisiana,* 379 U.S. 536 (1965). Such a policy is designed to protect against arbitrary and unequal enforcement of penal statutes in the sensitive area protected by the First Amendment. *Cox* v. *Louisiana, supra* at 557. *Staub* v. *City of Baxley,* 355 U.S. 313 (1958); *Kunz* v. *New York,* 340 U.S. 290 (1951); *Thornhill* v. *Alabama,* 310 U.S. 88 (1940) at 97-98.

The recent history of New York's flag desecration statute bears painful witness to the wisdom of the rule enunciated in *Thornhill*. Unfortunately, it appears that the flag veneration statute has been enforced with particular vigor against persons expressing dissenting views. Despite the widespread use of the flag in commercial contexts and in connection with orthodox political activity, counsel are aware of no prosecution for such activity.

In fact, the only persons against whom New York's flag laws have been invoked have been persons who have earned the enmity of local law enforcement officials by espousing dissenting political opinions or adopting non-conforming modes of dress.[8]

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[8] The following incidents reveal that the capacity for abuse inherent in New York's vague flag desecration statute has not been ignored.

In Claverack, New York, a young man was arrested for driving a red, white and blue Volkswagen (he also has a brown beard). *People* v. *Pregaskis*, currently pending in Claverack Justice of the Peace Court.

In Happaugue, New York, a young housewife was arrested and held on $500 bail for flying her American flag upside down to protest the Vietnam War. The Nassau County District Attorney appealed from the dismissal of her case. *People* v. *Hubner*, Nassau District Court. No action was taken, however, when the neighboring Rockville Centre American Legion flew its American flag upside down to protest government inaction concerning the Pueblo incident. *Newsday*, February 5, 1968, p. 15.

The District Attorney of Nassau County threatened to arrest any person found displaying the emblem of Women Strike for Peace in Nassau County. The emblem consists of a representation of the American flag with a peace symbol superimposed thereon. *Long Island Vietnam Moratorium Committee* v. *Cahn, supra.*

Counsel herein represent approximately 60 persons who have already been arrested in New York City for displaying the Women Strike for Peace emblem.

On the other hand, as was pointed out to the trial court at the time of sentencing (A 120a) there was then on public exhibition in New York City, the art collection of the Governor of the State

Even if some of the goals of the statute are *arguendo* proper, it must fall in its entirety because its application is so broad that it encompasses communications protected by the First Amendment. This is "a panel statute susceptible of sweeping and improper application." *NAACP* v. *Button*, 371 U.S. 415 (1963) at 432-433.

This Court has consistently refused to uphold a penal statute when conduct protected by the First Amendment may be deemed by local law enforcement officials to fall within the terms of its proscription. Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970); Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. of Pa. Law Rev. 67 (1960). Such overbroad statutes have been held to violate the constitution because they invite local law enforcement officials to suppress constitutionally protected conduct in the mistaken belief that such conduct is prohibited by the statute in question.

As the Court pointed out in *Hodsdon* v. *Buckson*, 310 F. Supp. 528 (D. Del. 1970), the Delaware statute which is essentially identical to the New York statute at issue herein,

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of New York, including a painting that consisted of the American flag with potatoes inserted in the field of stars, a picture of Governor Rockefeller imposed on the stripes, and also imposed on the stripes the words "Use Fork", "Idaho" and "New York". The newspaper advertisement for the art exhibit and the cover of the program reproduced this painting. Two or three weeks prior to the sentencing of appellant, the Governor's painting was reproduced in color as the cover of the New York Times Sunday Magazine. Needless to say, there was no prosecution of the persons sponsoring that art exhibit, of the New York Times, or of any of the newspapers which printed the advertisement. At the time of the argument in the New York Court of Appeals it was pointed out to that court that this same painting then hung in the Executive Mansion, a short distance from the courthouse.

Appellant is not offended by the use of the flag by patriotic groups, or, even in a commercial context. He is offended, however, that New York State's law enforcement apparatus enforces the statute with particular severity against political dissenters.

is capable of application to an infinite variety of expressive "conduct," ranging from flag burning to flying one's flag at half mast, to unorthodox gestures aimed at the flag. The existence of so broad a proscription impinges upon areas which are protected by the First Amendment and therefore renders the statute unconstitutional.

IV.

The Equal Protection Clause of the Fourteenth Amendment Bars the Conviction of Appellant for Displaying Sculpture in an Art Gallery Under a Statute Which Permits Newspaper and Magazine Publishers to Show Photographs of That sculpture in Their Publications and Permits Exhibition of Paintings on the Same Theme.

The statute under which appellant was convicted provides that it shall not apply to "an ornamental picture . . . or newspaper, or periodical. . . ."

A photograph of the flag-wrapped figure hanging by a yellow noose, which was in appellant's second floor gallery window, was printed in Life Magazine without danger of prosecution (A 49a). There is no conceivable rationale for permitting photographs of sculpture to be published in newspapers and periodicals and prohibiting an exhibition of the sculpture itself.

The equal protection clause of the Fourteenth Amendment forbids the State from arbitrarily discriminating between different classes of persons. Classification is permitted only when it is founded upon a rational policy, *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663 (1966); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886).

It is difficult to imagine a sound justification for applying the statute to a person who exhibits sculpture, the appellant in the instant case, and not to one who publishes

pictures of that sculpture or who exhibits paintings with the same theme.[9] There can be no legitimate reason to permit in a periodical a use of the flag which is prohibited in a sculpture exhibit. The statute, therefore, engages in invidious discrimination between similar groups—artists who paint and those who sculpt, art gallery proprietors who exhibit paintings or photographs and those who exhibit sculptures, and magazine and newspaper publishers, on the one hand, and art gallery proprietors on the other—and violates the equal protection clause of the United States Constitution.

CONCLUSION

For the Reasons Set Forth Above the Statute in Question Should Be Declared Unconstitutional and the Appellant's Conviction Reversed.

Respectfully submitted,

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[9] On the wall of appellant's gallery during the sculpture exhibition, there was displayed a painting of the noose figure and two other paintings using the flag motif (A 79a).

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1970

No. 169

STEPHEN RADICH,

Appellant,

v.

PEOPLE OF THE STATE OF NEW YORK,

Appellees.

On Appeal from the Court of Appeals of the State of New York

BRIEF OF JOHN B. HIGHTOWER, KARL KATZ AND KENNETH G. DEWEY, *AMICI CURIAE*

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TABLE OF CONTENTS

	PAGE
Interest of the *Amici*	1
Preliminary Statement	2
Questions to Which This Brief Is Addressed	4
Summary of Argument	4
Argument	
Point One—Works of visual art have traditionally been used to communicate ideas on current social and political issues	5
Point Two—Works of visual art are entitled to the protection of the First Amendment	9
A. Works of visual art are direct communications entitled to the same First Amendment status as speech and writing	9
B. Even if works of visual art are different from speech or writing, they are entitled to the protection of the First Amendment as non-verbal forms of expression	13
Point Three—The use of the flag in works of visual art does not justify loss of First Amendment protection	14
Conclusion	17
Appendix	A1-A21

INDEX TO APPENDIX

	PAGE
"The Floating Conch." Hieronymus Bosch. 1562	A1
"The Sale of Indulgences." Hans Holbein the Younger. 1520	A2
"The Polling." William Hogarth. 1754	A3
"The Legislative Paunch." Honoré Daumier. 1834	A4
"Tammany Ringdom." Thomas Nast. 1870	A5
Sketch for "The Slave Trade." Théodore Géricault. 1823	A6
"What a stupidity to assign them destinies in childhood." Goya. 1818-24	A7
"To the Lynching." Paul Cadmus. 1935	A8
"Birmingham Totem." Charles White. 1964	A9
"Passion of Sacco and Vanzetti." Ben Shahn. 1958	A10
"This is worse." Goya. Between 1810-20	A11
"The Dream of the Inventor of the Needle-gun." Honoré Daumier. 1866	A12
"My sweet homeland, what has become of you?" Georges Rouault. 1927	A13
"The Parents." Käthe Kollwitz. 1923	A14
"Vietnam." Chaim Koppelman. 1965	A15
"Guernica." Pablo Picasso. 1937	A16
"Wounded." Otto Dix. 1924	A17
"Executions of the Third of May, 1808." Goya. 1814	A18
"Untitled." Nobuaki Kojima. 1964	A19
"Flags." Jasper John. 1965	A20
"The Great American Nude II." Tom Wesselman. 1961	A21

TABLE OF AUTHORITIES

PAGE

Cases:

A Book Named "John Cleland's Memoirs of a Woman of Pleasure" *et al.* v. Attorney General of Massachusetts, 383 U.S. 413 (1966) 10

Brown v. Louisiana, 383 U.S. 131 (1966) 13
Burstyn v. Wilson, 343 U.S. 495 (1952) 10, 11, 16

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) 12

Freedman v. Maryland, 380 U.S. 51 (1965) 10

Garner v. Louisiana, 368 U.S. 157 (1961) 13

Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968) 10

Kingsley International Pictures Corporation v. Regents of the University of the State of New York, 360 U.S. 684 (1959) 9, 10, 11

People v. Radich, 26 N.Y. 2d 114 (1970) 15

Roth v. United States, 354 U.S. 476 (1954) 11

Street v. New York, 394 U.S. 576 (1969) 14

Terminiello v. Chicago, 337 U.S. 1 (1949) 9, 10
Thornhill v. Alabama, 310 U.S. 88 (1940) 13
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 13

United States v. One Book Entitled "Ulysses", 72 F. 2d 705 (1934) 12

PAGE

Other Authorities:

R. Doty, *Human Concern/Personal Torment* (1969) 5, 7

R. Shikes, *The Indignant Eye: The Artist as Social Critic* (1969) 5, 6, 7, 8

Time, July 6, 1970 16

Statutes:

N.Y. Education Law §§122, 122-a 10

N.Y. Penal Law §1425(16)(d) (Now N.Y. Gen. Bus. Law §136(d)) 2, 3, 16

IN THE

Supreme Court of the United States

October Term, 1970

No. 169

STEPHEN RADICH,

Appellant,

v.

PEOPLE OF THE STATE OF NEW YORK,

Appellees.

On Appeal from the Court of Appeals of the State of New York

BRIEF OF JOHN B. HIGHTOWER, KARL KATZ AND KENNETH G. DEWEY, *AMICI CURIAE*

Interest of the *Amici*

The *Amici* are a group of individuals connected with organizations involved with the arts. John B. Hightower is Director of The Museum of Modern Art, Karl Katz is Director of The Jewish Museum and Kenneth G. Dewey is a member of the New York State Commission on Cultural Resources. They are committed to the encouragement and preservation of works of art and freedom of artistic

expression. Since the case at bar involves both freedom of artistic expression and the right to exhibit controversial works of art, they have sought and obtained the consent of the parties to the submission of this brief *amici curiae*. Through this brief, the *amici* seek to convey their belief that artists are entitled to the broadest possible latitude in their choice of subjects and use of material; and that commercial galleries and museums are entitled to the same freedom in exhibiting works of art. Painters and sculptors have traditionally contributed valuable insight on social and political issues of the times through their work, and have traditionally used materials they deemed appropriate to the subject matter. It is important that artists be free to work in this manner, and that their work be freely exhibited to the public. The *amici* intend no comment by this brief either on the artistic merit or political message of the particular works of art involved in the case at bar. They are concerned only with the implications of this case for freedom of artistic expression, and for freedom to communicate such expression by way of public exhibition.

Preliminary Statement

This Court is asked in this case to determine the effect of the First Amendment to the United States Constitution on Section 1425(16)(d) of the Penal Law of New York (presently codified as Section 136(d) of the General Business Law). That section provides as follows:

> "16. Any person, who * * *
>
> "d. Shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon * * * by * * * act, or

"f. Shall publicly carry or display any emblem, placard or flag which casts contempt, either by word or act, upon the flag of the United States of America, * * *

"Shall be deemed guilty of a misdemeanor; * * *

"This subdivision shall not * * * be construed to apply to a(n) * * * ornamental picture * * * on * * * which shall be printed, painted or placed, said flag, standard, color, shield or ensign disconnected and apart from any advertisement."

Appellant Stephen Radich is the proprietor of an art gallery in New York City. He was convicted in the Criminal Court of New York County on May 5, 1967, of violations of Section 136(d), because he displayed certain sculptures by an artist named Marc Morrel which utilized reproductions of the American flag in highly critical contexts. The New York Court of Appeals affirmed appellant's conviction by a vote of 5 to 2 (Chief Judge Fuld and Judge Burke dissenting). The majority took the position that "the act" of "flag defilement" involved could constitutionally be punished, because it might cause "arousement of passions likely to lead to disorder." The dissenters argued that a work of art is a symbolic form of expression which may not constitutionally be punished in the absence of "a showing that the public health, safety and well-being of the community is threatened." The case is before this Court on appeal from the decision of the New York Court of Appeals.

Questions to Which This Brief Is Addressed

This brief is addressed to two questions (1) whether works of art are a form of expression entitled to the same First Amendment protection as speech and writing and (2) whether works of art dealing with political subjects involving use of the flag should be treated differently than other works of art.

Summary of Argument

I. Works of visual art have traditionally been used to communicate ideas on current social and political issues.

II. Works of visual art are entitled to the protection of the First Amendment.

A. Works of visual art are direct communications entitled to the same First Amendment status as speech and writing.

B. Even if works of visual art are different from speech or writing, they are entitled to the protection of the First Amendment as non-verbal forms of expression.

III. The use of the flag in works of visual art does not justify loss of First Amendment protection.

ARGUMENT

POINT ONE

Works of visual art have traditionally been used to communicate ideas on current social and political issues.

Throughout history artists have used their work to engage in social commentary. They have expressed their concern for political, religious and social injustice in their paintings, drawings and sculpture.

> "The artist does not revel in the bizarre, neither does he lampoon for the sake of the idle jest nor try to titillate a jaded public. Rather he desperately seeks to engage the mind and spirit of the spectator, to bring him to a state of awareness that will permit no evasion. He forces the spectator to reexamine values, but he does not reject society. He feels alienated, but he does not relinquish hope. His work may be commentary, indictment, or denunciation, but on whatever level he chooses to act he grapples with the real issues of mankind, knowing that art is more than embellishment and that he can make visual man's follies and estrangement." R. Doty, *Human Concern/Personal Torment* 7 (1969).

During the sixteenth and seventeenth centuries many artists were deeply concerned with religious injustice, and the moral and spiritual decay of the clergy. The Church and the papacy were the social order, and the Protestant Reformation was a challenge to the established hierarchy. R. Shikes, *The Indignant Eye: The Artist as Social Critic* 13 (1969) [hereinafter cited as Shikes].

In "The Floating Conch" Hieronymus Bosch expressed his disdain for the gluttony and lasciviousness of the clergy (Appendix, p. A1) while in "Antichristus" by Lucas Cranach the Elder (Shikes, p. 14) and in "The Sale of Indulgences" by Hans Holbein the Younger, the artists expressed their dismay at the unchristian practice of the sale of papal indulgences (Appendix, p. A2).

Artists have not only used their work to comment upon religious themes but also to comment upon other social and political issues. In "The Unhappy Pair at Home" from "Marriage *à la mode,*" William Hogarth condemned the frivolity and boredom of mid-eighteenth century English social life (Shikes, p. 70). Hogarth was very much concerned with the social and political evils of his day. In "The Polling" he satirized a political system in which for a fee the feebleminded, the crippled and the dying are led to the polls to vote (Appendix, p. A3).

Significant political comment was also engaged in by nineteenth century artists. In nineteenth century France, Honoré Daumier satirized the greed, self-satisfaction and self-aggrandizement of legislatures in his famous "The Legislative Paunch" (Appendix, p. A4). Daumier also attacked the injustices perpetrated by courts of justice and the roguery and amorality of the legal profession in a series of lithographs created between 1845 and 1848 entitled "Les Gens de Justice". In one of the series, "Hunger is no excuse for robbery", the portly judge demonstrates no mercy for the starving thief (Shikes, p. 170).

In the United States in the second half of the nineteenth century political spoof and satire flourished in artists'

works. Indignation at the power and influence of big industry and the monied trusts on government can be seen in Joseph Keppler's "The Bosses of the Senate" (Shikes, p. 319). Thomas Nast, the prominent American cartoonist, directed much of his political criticism toward the corruption and influence of the Tammany "Boss", William March Tweed. In "Tammany Ringdom", Nast depicted the Mayor of New York City on the throne and Tweed and his cohorts as the real powers behind the throne (Appendix, p. A5). "Corruption and degradation prompted Thomas Nast to create images of evil. Through caricature, with its distortion of ugly reality and mockery, he made travesties of politicians, statesmen and the clergy. The images from his pen provoked laughter, disgust and eventually, reform." Doty, *Human Concern/Personal Torment, supra.*

Artists expressed their indignation in the nineteenth century on subjects ranging from the slave trade in France, (See Géricault's sketch for "The Slave Trade," Appendix, p. A6) to the social inequities in Spain where the rigid order decreed at birth who was to be rich and who was to be poor for life. (See Goya's "What a stupidity to assign them destinies in childhood," Appendix, p. A7). In the twentieth century, American artists have protested lynchings and bombings in the South (See Paul Cadmus' "To the Lynching," Appendix, p. A8 and Charles White's "Birmingham Totem," Appendix, p. A9) and legal injustice in the North (See Ben Shahn's "Passion of Sacco and Vanzetti," Appendix, p. A10).

Some subjects, such as the plight of the poor and the insanity of war have been of constant concern to artists throughout the world for hundreds of years. In "Peasant

Monument''. Albrecht Dürer expressed sympathy for the peasants' uprising in Germany in 1525 which culminated in the Peasants' War (Shikes, p. 39). In Jean Francois Millet's ''The Diggers'' (Shikes, p. 205), the artist's compassion for the peasant is strongly expressed. In Franz Kupka's ''The Cog'' (Shikes, p. 221) and William Gropper's ''Sweatshop'' (Shikes, p. 340), the plight of the worker is depicted.

From Goya to Picasso, from the Napoleonic Wars through World War II and Vietnam, artists have attacked the cruelty and destruction occasioned by war. (See Goya's ''Executions of the Third of May, 1808,'' Appendix, p. A18; Goya's ''This is worse,'' Appendix, p. A11; Honoré Daumier's ''The Dream of the Inventor of the Needle-gun,'' Appendix, p. A12; Georges Rouault's ''My sweet homeland, what has become of you?'' Appendix, p. A13; Picasso's ''Guernica,'' Appendix, p. A16; Käthe Kollwitz's ''The Parents,'' Appendix, p. A14; Otto Dix's ''Wounded,'' Appendix, p. A17; and Chiam Koppelman's ''Vietnam,'' Appendix, p. A15).

Because the artist thus expresses himself through his work, the implications of the case at bar extend far beyond one particular sculptor's use of the flag in his constructions. If the conviction below is upheld by this Court, the traditional practice of artists expressing themselves on controversial subjects through materials and symbols appropriate to the subject, will be limited; and the artists' freedom generally to express himself through his work will be threatened. It is not beyond the realm of possibility for governmental authority to prohibit paintings of the human anatomy as obscene or to prohibit vivid collages or con-

structions employing totalitarian symbols as a form of disrespectful attack on those in power. At the same time, speech and writing of the same import would necessarily be permitted. Such special treatment of works of art would directly contravene the spirit and intent of the First Amendment.

Indeed, it would be ironic for painting and sculpture to receive less protection than speech or writing. The intense sensitivity of artists to injustice, their independence of mind and integrity of vision, their special ability to perceive and peacefully transmit profound truths is, if anything, entitled to greater encouragement and protection.

POINT TWO

Works of visual art are entitled to the protection of the First Amendment.

A. Works of visual art are direct communications entitled to the same First Amendment status as speech and writing.

"[T]he First Amendment's basic guarantee is of freedom to advocate ideas." *Kingsley International Pictures Corporation* v. *Regents of the University of the State of New York*, 360 U. S. 684, 688 (1959). As this Court said in *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949):

> "The vitality of civil and political institutions in our society depends on free discussion. As Chief Justice Hughes wrote in *De Jonge* v. *Oregon*, 299 U. S. 353, 365, it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The

> right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes."

Because of the importance and value of freedom of expression to our society, the communication of ideas protected by the First Amendment is not limited to words alone. Although the use of words to express ideas has traditionally been protected, *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" et al.* v. *Attorney General of Massachusetts,* 383 U. S. 413 (1966); *Terminiello* v. *Chicago, supra,* so has the use of motion pictures. *Interstate Circuit, Inc.* v. *City of Dallas,* 390 U. S. 676 (1968); *Freedman* v. *Maryland,* 380 U. S. 51 (1965); *Kingsley International Pictures Corporation* v. *Regents of the University of the State of New York, supra; Burstyn* v. *Wilson,* 343 U. S. 495 (1952).

In *Kingsley International Pictures Corporation* v. *Regents of the University of the State of New York, supra,* 360 U. S. at 687, the appellant, a motion picture distributor, was denied a license by the State Board of Regents to exhibit "Lady Chatterley's Lover" under a New York licensing statute, N.Y. Education Law §§122 and 122-a (McKinney 1953) which required the denial of a license to motion pictures in which acts of sexual immorality are portrayed as desirable or acceptable patterns of behavior.

This Court held (360 U. S. at 688, 689):

> "What New York has done, therefore, is to prevent the exhibition of a motion picture because that picture advocates an idea—that adultery under certain circumstances may be proper behavior. Yet the First Amendment's basic guarantee is of freedom to advo-

cate ideas. The State, quite simply, has struck at the very heart of constitutionally protected liberty.

"It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing."

The protection accorded freedom of expression in speeches, books and motion pictures applies as well to paintings and sculptures. The First Amendment protects the advocacy of ideas, regardless of the means through which they are advocated. *Burstyn* v. *Wilson, supra,* 343 U. S. at 503. There is absolutely no distinction which would protect motion picture expression of ideas, and permit inhibitions of ideas through painting or sculpture.

On the contrary, if strong speech, vivid writing and graphic film drama are protected, it follows, *a fortiori,* that the more passive forms of communication and expression (e.g. pantomime) are also protected. Painting and sculpture clearly are communications more passive than motion pictures, speech or writing—and therefore at least as protected.

The First Amendment does not confer absolute rights. It does not protect obscenity nor communications which may lead to an immediate breach of the peace. *Roth* v.

United States, 354 U. S. 476 (1954); *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942). But there is a greater likelihood that a breach of the peace will ensue from a demogogic speech before an excited audience than from an exhibition of a painting or sculpture no matter how offensive or unpopular the views expressed by the artist. Clearly, hortatory words are more active than works of art; yet both are communications, and words are protected by the First Amendment. Works of art cannot receive less favorable treatment. The protection due to art was recognized in the landmark case of *United States* v. *One Book Entitled "Ulysses",* 72 F. 2d 705, 708 (1934):

> "It may be that Ulysses will not last as a substantial contribution to literature, and it is certainly easy to believe that, in spite of the opinion of Joyce's laudators, the immortals will still reign, but the same thing may be said of current works of art and music and of many other serious efforts of the mind. Art certainly cannot advance under compulsion to traditional forms, and nothing in such a field is more stifling to progress than limitation of the right to experiment with a new technique. The foolish judgments of Lord Eldon about one hundred years ago, proscribing the works of Byron and Southey, and the finding by the jury under a charge by Lord Denman that the publication of Shelley's "Queen Mab" was an indictable offense are a warning to all who have to determine the limits of the field within which authors may exercise themselves."

B. Even if works of visual art are different from speech or writing, they are entitled to the protection of the First Amendment as non-verbal forms of expression.

This Court has consistently held that the protection of the First Amendment extends to non-verbal as well as verbal communications. *Brown* v. *Louisiana,* 383 U. S. 131 (1966); *Garner* v. *Louisiana,* 368 U.S. 157 (1961); *Thornhill* v. *Alabama,* 310 U. S. 88 (1940).

In *Brown* v. *Louisiana, supra,* 383 U. S. at 141, 142, this Court approved a sit-in to protest the segregation of public library facilities in Clinton, Louisiana, stating:

> "We are here dealing with an aspect of a basic constitutional right—the right under the First and Fourteenth Amendments guaranteeing freedom of speech and of assembly, and freedom to petition the Government for a redress of grievances. * * * As this Court has repeatedly stated, these rights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities."

In *Tinker* v. *Des Moines Independent Community School District,* 393 U. S. 503 (1969), this Court held that school officials could not prohibit the wearing of armbands by high school and junior high school students during school hours to protest United States involvement in Vietnam. Since the wearing of armbands constituted a non-verbal expression of political views unaccompanied by disruptive

or disorderly behavior, it was entitled to the protection of the First Amendment.

A sculpture or any other work of visual art, is a form of expression unaccompanied by disruptive or disorderly behavior. Whether or not it protests the war in Vietnam, or contains any other political or social message, it is entitled to the protection of the First Amendment.

POINT III

The use of the flag in works of visual art does not justify loss of First Amendment protection.

Visual artists communicate through works of art (Point I, *supra*). They are entitled under the First Amendment to express themselves freely—i.e. to communicate freely through works of art (Point II, *supra*). For freedom of expression to be meaningful, the artist must be free to use representations appropriate to the subject matter. As a writer or speaker is entitled to his verbal image, the painter or sculptor is entitled to his visual image.

One may agree or disagree with the particular political view expressed by the works of art involved in the case at bar. But it is difficult to perceive why their display should be unlawful. If it is appropriate to write about the flag, and to speak about the flag, as this Court has recently held in *Street* v. *New York,* 394 U. S. 576 (1969), then it should follow that it is appropriate to represent the flag in painting and sculpture. If it is appropriate to sell books and make public speeches with the message that "the flag is being disgraced by the Vietnam War", it should follow

that it is appropriate to display paintings and sculptures conveying the same message, or other messages on politically controversial issues.

It is worthy of note that the American flag has been portrayed in numerous works of art and by many great artists, e.g. Jasper John's "Flags" (Appendix, p. A20), Tom Wesselman's "The Great American Nude II" (Appendix, p. A21), and Nobuaki Kojima's "Untitled" (Appendix, p. A19). The flag has been used as a decorative motif, as a symbol of America or of patriotism, and as a means of identifying the subject matter of a work as American. Certainly no valid distinction under the First Amendment can be made which would permit representations of the flag by artists in praise or glorification of America but not in criticism. Yet, that is the danger of the decision in the case at bar.

As Chief Judge Fuld stated in his dissenting opinion below, *People* v. *Radich,* 26 N.Y. 2d 114, 128 (1970):

> "It is evident that the only reason why these works of Morrel were singled out for prosecution was not because the flag was used in the sculptures but solely because of the particular political message which those sculptures were intended to convey. In a very real sense, therefore, it was not the artist's *act* of making use of the flag which is being punished but solely the *protest* or the political views he was seeking thereby to express."

If Judge Fuld is right, the decision below must be reversed. And Judge Fuld can only be wrong if distortion by visual artists in their representation of the flag is to be

banned altogether. That would make of the flag a sacred object, not to be depicted unless absolutely accurately, and, presumably not to be spoken or written about in a distorted or disparaging manner. The result would be to protect the flag as object, rather than symbol, beyond the protection from sacrilege granted, in view of the First Amendment, to the most sacred religious persons and objects. *Burstyn* v. *Wilson, supra.* S. I. Hayakawa was recently quoted regarding the flag in *Time* (July 6, 1970, at 15):

> "When a symbol becomes a fetish then you make the semantic error of confusing the symbol with what it is supposed to symbolize."

We respectfully submit that the decision below makes the flag a fetish. By applying §136(d) to display of the sculptures involved in the case at bar, without even inquiring whether display of the sculptures was accompanied by, or created, disorder, the lower Court struck at the very heart of artistic freedom of expression. [In fact, the exhibit by appellant Radich in the case at bar ran for two weeks prior to service of summons and for ten days thereafter with no disorder of any kind.] It confused peaceful communication entitled to the protection of the First Amendment with incitement to disorder purely because the flag was involved—thus making the flag more sacrosanct than religious objects. We respectfully submit that the flag desecration statute cannot be applied to the exhibition of visual works of art—consistently with the First Amendment—in the absence of a *concrete* showing of likelihood of disorder. Otherwise, visual works of art would be treated differently than other communications, and distorted flag representations would have to be banned alto-

gether. We submit that there is no reason either to treat paintings and sculptures differently from speech and writing; or to ban flag representations altogether.

Conclusion

The appellant's conviction below contravened his right to freedom of expression under the First Amendment, and should be reversed.

Respectfully submitted,

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December, 1970

"The Floating Conch." Hieronymus Bosch. 1562.

(Printed as page A1)

A1

"The Sale of Indulgences."
Hans Holbein the Younger. 1520.

(Printed as page A2)

A 2

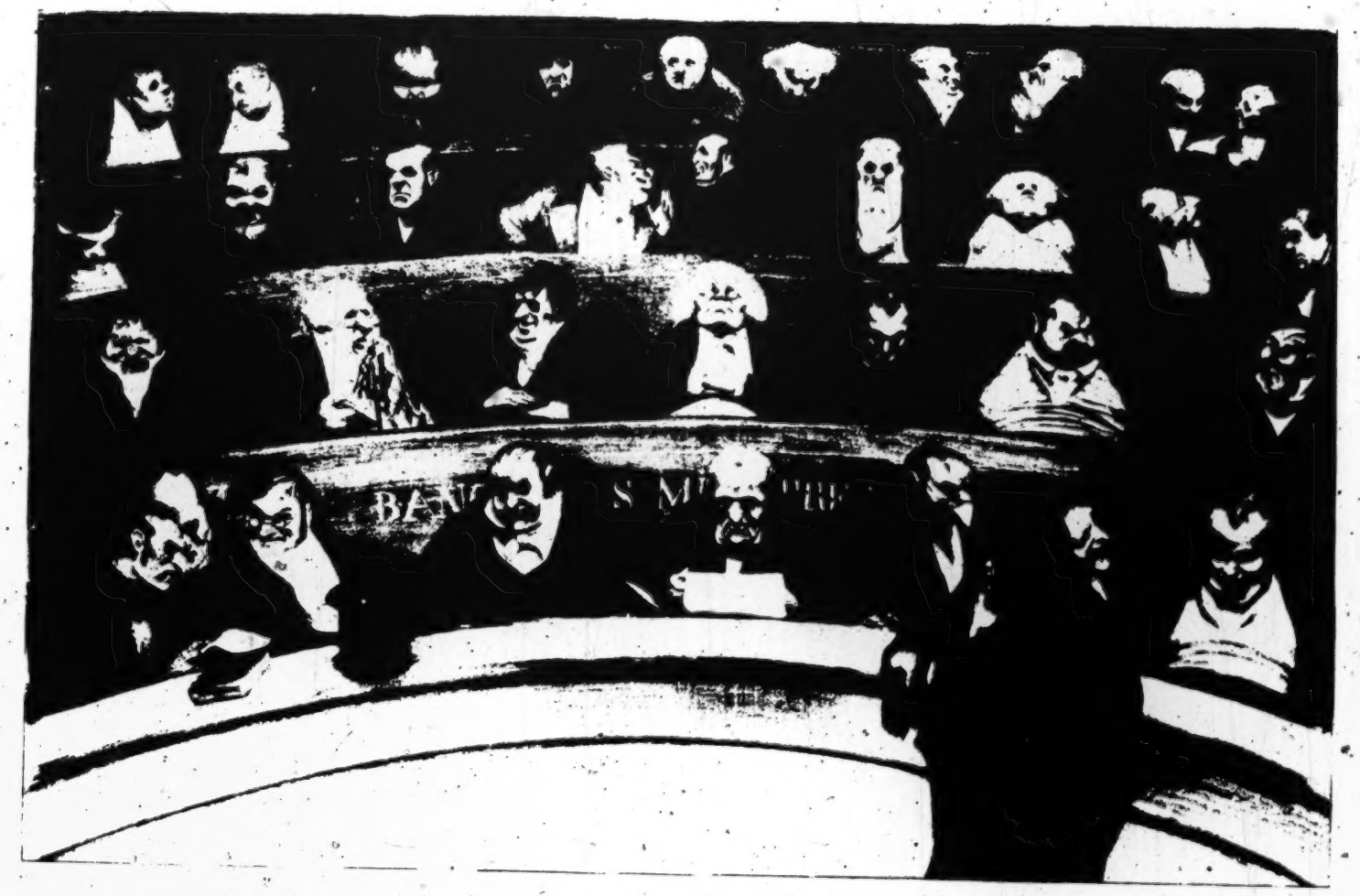
"The Polling." William Hogarth. 1754.

(Printed as page A3)

"The Legislative Paunch." Honore Daumier. 1834.

(Printed as page A4)

A4



"Tammany Ringdom." Thomas Nast. 1870.

(Printed as page A5)

A 5

THE POWER BEHIND THE THRONE.

HE CANNOT CALL HIS SOUL HIS OWN.

Th. Nast.

Sketch for "The Slave Trade."
Theodore Gericault. 1823.

(Printed as page A6)

A6

"What a stupidity to assign them destinies in childhood." Goya. 1818-24.

(Printed as page A7)

A7

13

¡Q.e Necedad! dar destinos en la niñez

108

"To the Lynching." Paul Cadmus. 1935.

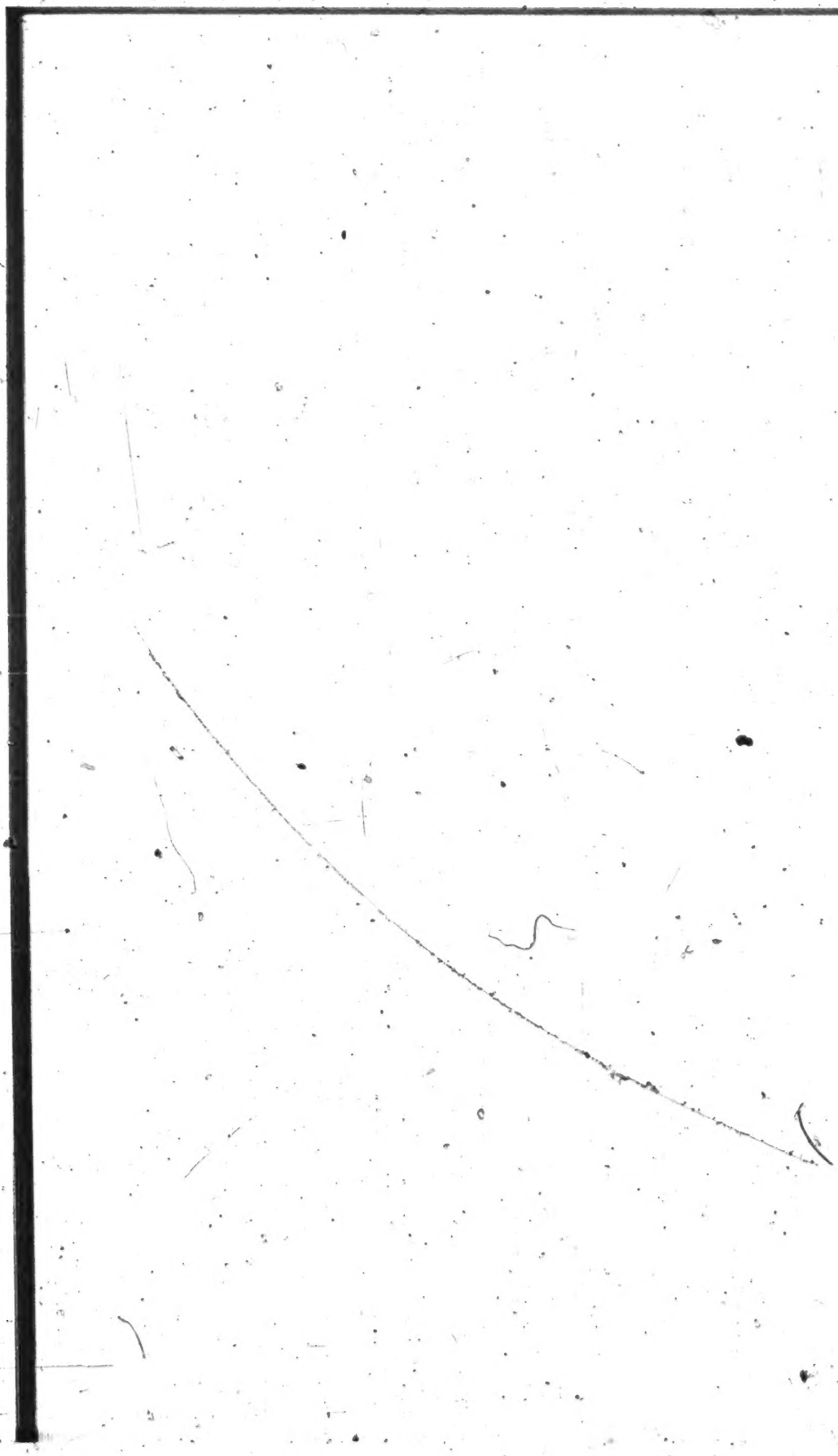
(Printed as page A8)

A8

"Birmingham Totem." Charles White. 1964.

(Printed as page A9)

A 9



"Passion of Sacco and Vanzetti." Ben Shahn. 1958.

(Printed as page A10)

IF IT HAD NOT BEEN FOR THESE THING, I MIGHT HAVE LIVE OUT MY LIFE TALKING AT STREET CORNERS TO SCORNING MEN. I MIGHT HAVE DIE, UNMARKED, UNKNOWN A FAILURE. NOW WE ARE NOT A FAILURE. THIS IS OUR CAREER AND OUR TRIUMPH. NEVER IN OUR FULL LIFE COULD WE HOPE TO DO SUCH WORK FOR TOLERANCE, FOR JUSTICE, FOR MAN'S UNDERSTANDING OF MAN AS NOW WE DO BY ACCIDENT. OUR WORDS - OUR LIVES - OUR PAINS NOTHING! THE TAKING OF OUR LIVES- LIVES OF A GOOD SHOEMAKER AND A POOR FISH PEDDLER-ALL! THAT LAST MOMENT BELONGS TO US- THAT AGONY IS OUR TRIUMPH.

"This is worse." Goya. Between 1810-20.

(Printed as page A11)

"The Dream of the Inventor of the Needle-gun."
Honore Daumier. 1866.

(Printed as page A12)

A 12

"My sweet homeland, what has become of you?"
Georges Rouault. 1927.

(Printed as page A13)

"The Parents." Kathe Kollwitz. 1923.

(Printed as page A14)

A 14

"Vietnam." Chaim Koppelman. 1965.

(Printed as page A15)

A 15

"Guernica." Pablo Picasso. 1937.

(Printed as page A16)

"Wounded." Otto Dix. 1924.

(Printed as page A17)

"Executions of the Third of May, 1808." Goya. 1814.

(Printed as page A18)

A 18

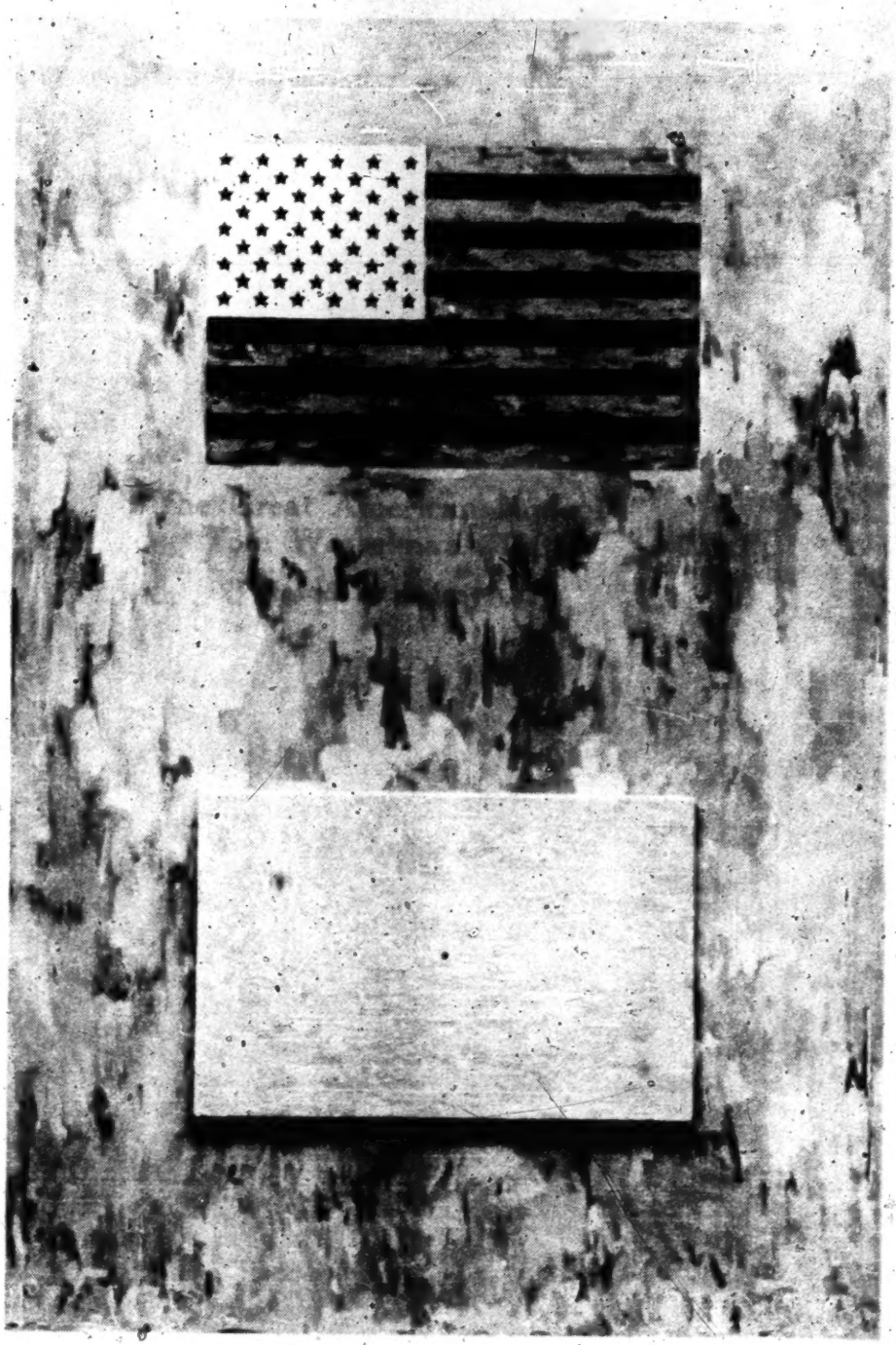
"Untitled." Nobuaki Kojima. 1964.

(Printed as page A19)

"Flags." Jasper John. 1965.

(Printed as page A20)

A 20



"The Great American Nude II."
Tom Wesselman. 1961.

(Printed as page A21)

A 21

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IN THE

Supreme Court of the United States

October Term, 1970

No. 169

STEPHEN RADICH,

Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

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TABLE OF CONTENTS

	PAGE
Opinions and Proceedings Below	1
Statute Involved	2
Questions Presented	5
Statement of the Case	6
The Evidence at the Trial	8
The People's Case	8
The Defendant's Case	9
Summary of Argument	11
Point I—Conduct that publicly casts contempt upon the American flag by physical use of the flag is not protected by the First Amendment	16
Point II—The flag statute is not void for vagueness or overbreadth	38
Point III—The statutory exception that permits certain non-contemptuous uses of the flag if disconnected from advertisements does not deny appellant equal protection	51
Conclusion	54

TABLE OF AUTHORITIES

Cases:

Adderly v. Florida, 385 U.S. 39 (1966)	12, 13, 21, 24, 27, 30, 40, 41
Alexander v. United States, 271 F.2d 140 (8th Cir. 1959)	48
Bachellar v. Maryland, 397 U.S. 564 (1970)	29
Bantam Books v. Sullivan, 372 U.S. 58 (1963)	22

PAGE

Beauharnais v. Illinois, 343 U.S. 250 (1950) 15, 40, 41
Breard v. Alexandria, 341 U.S. 622 (1951) 22, 28n
Brown v. Louisiana, 383 U.S. 131 (1966) 24
Bryson v. United States, 396 U.S. 64 (1969) 45

California v. Williamson, 207 Cal. App.2d 839, 24 Cal. Rptr. 734 (Dist. Ct. of App. 1962) 48
Cameron v. Johnson, 390 U.S. 611 (1968) 40, 41, 46
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) 15, 35, 36, 41, 47, 50
Close v. Lederle, 424 F.2d 988 (1st Cir. 1970), *cert. denied,* No. 332, Oct. Term 1970 ..... 13, 28
Connally v. General Construction Co., 269 U.S. 385 (1926) 38
Cowgill v. California, 396 U.S. 371 (1970) 22
Cox v. Louisiana, 379 U.S. 536 (1965) 12
Cox v. Louisiana, 379 U.S. 559 (1965) 13, 20, 21, 24
Crosson v. Silver, —— F.Supp. ——, No. Civil 70-79 Tucson (D. Ariz. Nov. 13, 1970) 33, 36

Dennis v. United States, 341 U.S. 494 (1951) 30, 43
Dombrowski v. Pfister, 380 U.S. 479 (1965) 43, 46

Fenster v. Leary, 20 N.Y.2d 309 (1967) 46
Fox v. Washington, 236 U.S. 273 (1915) 43

Garner v. Louisiana, 368 U.S. 157 (1961) 37
Ginzburg v. United States, 383 U.S. 463 (1966) 30, 40, 43, 49
Golden v. Zwickler, 394 U.S. 103 (1969) 43, 45

Halter v. Nebraska, 205 U.S. 34 (1907) 12, 13, 17, 19n, 20n, 24, 25, 26, 34, 52
Hoffman v. United States, 256 A2d 567 (D.C. App. 1969) 19n

Jordan v. De George, 341 U.S. 223 (1951) 41, 43
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Joyce v. United States, 259 A2d 363 (D.C. App. 1969) .. 19n

PAGE

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Kovacs v. Cooper, 336 U.S. 77 (1949) 13, 20, 21, 29, 43

Long Island Vietnam Moratorium Comm. v. Cahn, —— F.2d —— (2d Cir., Slip Opn. 328, Dec. 1970) .. 42n

Nash v. United States, 229 U.S. 373 (1913) 39
New York ex rel. Hatch v. Reardon, 204 U.S. 152 (1907) 43

People v. Cowgill, 274 Cal. App. 174, 78 Cal. Rptr. 853 (Cal. Super. 1969), *appeal dismissed,* 396 U.S. 371 (1970) 13, 14, 20n, 22, 34
People v. Finkelstein, 11 N.Y.2d 300 (1962), *cert. denied* 371 U.S. 863 (1962) 48
People v. Hubner, N.Y.L.J., March 18, 1970 (Dist. Ct. Nassau Ctny) 42n
People v. Pregaskis, (Town Justice Ct., N.Y.) 42n
People v. Radich, 26 N.Y.2d 114 (1970), *aff'g.* 57 Misc. 2d 1082 (1968), *aff'g.* 53 Misc.2d 717 (1967) 2, 33, 34
People v. Stover, 12 N.Y.2d 462 (1963), *appeal dismissed,* 375 U.S. 42 (1963) 13, 28, 29
People v. Street, 20 N.Y.2d 231 (1967), *rev'd,* 394 U.S. 576 (1969) 13, 20n, 33
People v. Verch, 63 Misc.2d 477 (Ct. Spec. Sess. 1970) 32
Public Utilities Commission v. Pollak, 343 U.S. 451 .... 28n

Redrup v. New York, 386 U.S. 767 (1967) 13, 28
Rosen v. United States, 161 U.S. 29 (1896) 49
Roth v. United States, 354 U.S. 476 (1957) 15, 38, 40, 41

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Scales v. United States, 367 U.S. 203 (1961) 43, 50

PAGE

Schacht v. United States, 398 U.S. 58 (1970) 15, 32, 33
Schindler v. United States, 208 F.2d 289 (9th Cir. 1953) 48
Shuttlesworth v. Birmingham, 382 U.S. 87 (1965) 45
Smith v. California, 361 U.S. 147 (1959) 16, 48
State v. Schlueter, 127 N.J.C. 496, 23 A.2d 249 (N.J. 1941) 47
Street v. New York, 394 U.S. 576 (1969) 12, 14, 19, 20, 21, 24, 26, 30, 34, 45, 46
Stromberg v. California, 283 U.S. 359 (1931) 15, 32

Time, Inc. v. Hill, 385 U.S. 374 (1967) 22
Tnker v. Des Moines School District, 393 U.S. 503 (1969) 20, 21, 22, 23, 29, 31

United States v. Dennis, 183 F.2d 201 (2d Cir. 1950) (L. HAND, J.) *aff'd.* 341 U.S. 494 (1951) 44
United States v. Ferguson, 302 F. Supp. 1111 (N.D. Cal. 1969) 19n
United States v. Harriss, 347 U.S. 612 (1954) 38, 43
United States v. Hockman, 277 F.2d 631 (7th Cir. 1960), *cert. denied* 364 U.S. 837 (1960) 48
United States v. Knox, 396 U.S. 77 (1969) 45
United States v. National Dairy Corp., 372 U.S. 29 (1963) 38, 40, 41
United States v. Oakley, 290 F.2d 517 (6th Cir. 1961), *cert. denied,* 368 U.S. 888 (1961) 48
United States v. O'Brien, 391 U.S. 367 (1968) 12, 14, 20, 21 23, 31, 32, 47, 50
United States v. Petrillo, 332 U.S. 1 (1947) 30, 41
United States v. Ragen, 314 U.S. 513 (1942) 40
United States v. Wurzbach, 280 U.S. 396 (1930) 39, 43

Valentine v. Chrestenson, 316 U.S. 52 (1942) 22

PAGE

West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943) 15, 26, 29
Williams v. United States, 341 U.S. 97 (1951) 16, 41, 43
Winters v. New York, 333 U.S. 507 (1948) 15, 38, 41
Zwickler v. Koota, 389 U.S. 241 (1967) 46

Statutes:

N.Y. CPLR §3001 46
N.Y. General Business Law §136 ..... 2, 17
N.Y. Penal Law of 1909 §1425 (16) 2-5, 6, 8, 17, 52
Ch. 54 [1917] Laws of N.Y. 106 (caption) 19n
4 U.S.C. §3 24
15 U.S.C. §1052(b) 25
18 U.S.C. §§331, 333 26
18 U.S.C. §700 (Supp. IV 1968) 19
18 U.S.C. §700(c) 19
36 U.S.C. §170 ..... 24n
56 Stat. 377, c. 435, 36 U.S.C. §§172-177 24

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Flag and the Law, 4 VALPARAISO U.L. REV. 345 (1970) 19n, 36
Holmes, C.J., remarks, 178 Mass. 627 (1901) 24n
LINCOLN, COLLECTED WORKS (Basler ed. 1953) 24n

PAGE

N.Y. Daily News, May 9, 1970 ..... 35n
N.Y. Post, May 22, 1970 ..... 35n
N.Y. Times, Oct. 1, 23, 26, 1966
Nov. 24, 27, 1966
Dec. 14, 1966 ..... 31n
N.Y. Times, May 12, 1970 ..... 35n
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Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970) 44
OUR FLAG (Schauffler ed. 1926) 24n
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WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, Unabridged (1969) 39
51 N.Y.S. Dept. Rep. 240 (1934) 19n
1941 Rep. of N.Y. Att'y Gen. 465 ..... 19n
1943 Rep. of Att'y Gen. 90-91 ..... 19n

IN THE

Supreme Court of the United States

October Term, 1970

No. 169

STEPHEN RADICH,

Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

BRIEF FOR APPELLEE

Opinions and Proceedings Below

Appellant Stephen Radich appeals from an order of the Court of Appeals of New York entered February 18, 1970, affirming, with an opinion, two judges dissenting, an order of the Appellate Term, First Judicial Department, of the Supreme Court of the State of New York, entered June 13, 1968, unanimously affirming, without an opinion, a judgment of the Criminal Court of the City of New York, New York County, rendered May 5, 1967, convicting Radich, after a

trial before three judges, one judge dissenting, of malicious injury to and destruction of property (former N. Y. Penal Law §1425 (16)(d), presently N. Y. General Business Law §136), and sentencing him to a fine of $500 or 60 days' imprisonment.

The Court of Appeals opinions are reported at 26 N.Y. 2d 114, 308 N.Y.S.2d 846 and are reproduced in the Appendix at pages 6a-22a.

The Appellate Term affirmance, without opinion, is reported at 57 Misc.2d 1082, 294 N.Y.S.2d 680.

The trial court opinions are reported at 53 Misc.2d 717, 279 N.Y.S.2d 680, and are reproduced in the Appendix at pages 25a-36a.

Statute Involved

Radich was convicted of a violation of section 1425, subdivision 16(d), of the New York Penal Law of 1909, which was repealed, effective September 1, 1967, with the enactment of a completely revised Penal Law. Upon the repeal of the former Penal Law, section 1425 was transferred to the New York General Business Law, section 136, with one change: the provision that permitted the recovery of a civil penalty for each offense in addition to the conviction for a misdemeanor was repealed.

Section 1425(16) of the former Penal Law is reproduced in full below, with the subdivision here in question printed

in italics, and with the exception that the civil penalty provision is omitted.

"16. Any person, who

"a. In any manner, for exhibition or display, shall place or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement, of any nature upon any flag, standard, color, shield or ensign of the United States of America, or the state of New York, or shall expose or cause to be exposed to public view any such flag, standard, color, shield or ensign, upon which after the first day of September, nineteen hundred and five, shall have been printed, painted or otherwise placed, or to which shall be attached, appended, affixed, or annexed, any word figure, mark, picture, design or drawing or any advertisement of any nature, or

"b. Shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale, or to give away, or for use for any purpose, any article, or substance, being an article of merchandise, or a receptacle of merchandise or article or thing for carrying or transporting merchandise, upon which after the first day of September, nineteen hundred and five, shall have been printed, painted, attached, or otherwise placed, a representation of any such flag, standard, color, shield or ensign, to advertise, call attention to, decorate, mark, or distinguish, the article or substance on which so placed, or

"c. Shall print, engrave, or otherwise place or cause to be printed, engraved or otherwise placed on any blank check, bill head, letter head, envelope or other business stationery, a representation of any such flag, standard, color, shield or ensign, or shall use any such blank check, bill head, letter head, envelope or other stationery for business purposes or correspondence, or

"d. *Shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon* either *by* words or *act,* or

"e. Shall raffle or place in pawn any such flag, standard, color, shield or ensign, or

"f. Shall publicly carry or display any emblem, placard or flag which casts contempt, either by word or act, upon *the flag of the United States of America,* or

"g. Shall publicly use or cause any such flag, standard, color, shield or ensign, to be publicly used as a receptacle for the placing, depositing or collecting of money or any other article or thing,

"Shall be guilty of a misdemeanor;* * *

"The words flag, standard, color, shield or ensign, as used in this subdivision or section, shall include any flag, standard, color, shield or ensign, or any picture or representation, of either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of, said flag, standard, color, shield or ensign, of the United States of America, or of the state of New York, or a picture or a representation of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, colors, standard, shield or ensign of the United States of America, or of the state of New York,

"This subdivision shall not apply to any act expressly permitted by the statutes of the United States of America, or by the United States army and navy regulations, nor shall it be construed to apply to a certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, stationery for use in private correspondence, or newspaper or periodical on any of which shall be

printed, painted or placed, said flag, standard, color, shield or ensign disconnected and apart from any advertisement.

"The possession by any person, other than a public officer, as such, of any such flag, standard, color, shield or ensign, on which shall be anything made unlawful at any time by this section, or of any article or substance or thing on which shall be anything made unlawful at any time by this section shall be presumptive evidence that the same is in violation of this section, and was made, done or created after the first day of September, nineteen hundred and five, and that such flag, standard, color, shield, ensign, or article, substance, or thing, did not exist on the first day of September, nineteen hundred and five."

Questions Presented

1. Are acts that publicly cast contempt upon the flag of the United States by physical use of actual flags protected by the First Amendment?

2. Is the New York statute prohibiting any person from publicly casting contempt upon the American flag by act unconstitutionally vague?

3. Does the statutory exemption of a non-contemptuous use of the flag in an ornamental picture, newspaper or periodical, not connected with an advertisement, deprive appellant, a dealer in sculptures, of equal protection of the laws?

Statement of the Case

The Complaint*

CRIMINAL COURT OF THE CITY OF NEW YORK

Part 7, *County of* New York

State of New York)
County of New York) *ss.*:

Patrolman John P. Burns, *of No.* 19 Precinct, *County of* New York, *City of New York, being duly sworn, deposes and says that on* December 27, 1966 at about 8:30 a.m. and December 28, 1966 *at about* 5:30 p.m. *at* on second floor at 818 Madison Avenue *in the County of* New York, *State of New York, the defendant,* STEPHEN RADICH *did commit the crime of*: did violate section 1425 of the New York State Penal Law, subdivision 16-Paragraph d & f, in that any person who shall publicly mutilate, deface, defile or defy, trample upon, or cast contempt upon the flag, standard, shield or ensign, of the United States of America, either by words or act or shall publicly carry or display any emblem, placard or flag which casts contempt, either by word or act, upon the flag of the United States of America:

under the following circumstances:

your deponent states that at the above location, the Radich Gallery, on December 27, 1966 at 8:30 a.m., he observed that the defendant did have on display, in a large window, facing the public sidewalk, the flag of the United States of America, in the form of a body hanging from a yellow noose. Deponent further states that on December 28, 1966 at about 5:30 p.m., at the above

* Reproduced in the printed Appendix at pp. 2a-3a. Italics identify the standard printed portion of the complaint form.

mentioned location, the defendant did have on public display and for public viewing the flag of the United States of America, in the following manner; 1—in the form of a male sexual organ, protruding from the body of form, in the anterior portion of the body of the form and depicting the erected male penis, protruding from a form of a cross. 2—the flag of the United States of America, wrapped in a chained bundle. 3—the standard of the United States on a form of an alleged elephant. 4—The Union of the flag of the United States of America, depicted in the form of an octopus. 5—the American flag attached to a gas meter. 6—The American flag wrapped around a bundle attached to a two wheeled vehicle. 7—The American flag in the form of a body, hanging from a yellow noose. Your deponent further states that the defendant is the owner and operator of the premises mentioned above.

Wherefore deponent prays that the defendant be dealt with according to law.

Sworn to before me
January 4, 1967

(signed) Ptl. John P. Burns

(signed) Walter J. Bayer
Judge, Criminal Court
of the City of New York

The Evidence at the Trial

The People's Case

Patrolman **John P. Burns** of the New York City Police Department testified that on December 27, 1966, at 8:30 a.m., while on duty, he was outside the premises 818 Madison Avenue (39a-40a).* He observed in the second story window of the building what apeared to be the flag of the United States, formed in the shape of a human body, suspended by a yellow noose (40a, 45a; People's Exhibit 1).

The following day, December 28, 1966, at 5:00 p.m., he returned to 818 Madison Avenue, accompanied by Patrolman Myrich of the Police Department's Photo Unit (40a). They entered an art gallery located on the second floor. The gallery was open to the public, free of charge (45a). Within the gallery, he saw twelve or thirteen exhibits on display (45a). Some of the exhibits employed the flag of the United States (47a). Nearby, he saw the defendant engaged in conversation with an unknown female. When asked by the officer, the defendant identified himself as Stephen Radich, proprietor of the gallery. Thereupon, Patrolman Burns served the defendant with a summons for a violation of Section 1425 of the Penal Law (40a).

When questioned, the defendant said that he was not the person who created the works exhibited in the gallery; however, he received a commission for their sale (40a-41a, 54a-55a).

Each of the objects in which the American flag appeared was photographed and the photographs were received in evidence as People's Exhibits 1 through 9 (41a-44a).

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* References are to the pages of the printed Appendix.

The Defendant's Case

Stephen Radich, the defendant, testified that he is the sole proprietor of an art gallery located at 818 Madison Avenue; he owned the gallery for seven years (76a, 88a). On December 27th and 28th, 1966, he exhibited, in his gallery, thirteen works by Marc Morrel (78a). The gallery was open to the public, there was no admission charge, and brochures were sent out to publicize the exhibit (78a, 88a; Defendant's Exh. B).

All of Morrel's works were for sale. There was a set price list and Morrel's works ranged in price from $250 to $1200. By an arrangement with Morrel, Radich's commission for a sale was thirty-three and one-third per cent (80a, 82a-83a, 88a). He sold one work for $900 and accordingly received a commission of $300 (89a).

Radich considered Morrel's work to be protest art (81a). In his opinion, the works protested war; destruction; certain societies; injustices in this country; and infringement upon the freedom of speech (82a). During the exhibit "war protest songs" were played on a tape recorder (80a). In exhibiting Morrel's works, he did not intend to be contemptuous of the flag of the United States (82a). He "displayed them because they were works of art, and because [like] all other works of art in the gallery they were for sale" (94a-95a).

One of Morrel's works [depicted in People's Exhibits 3 and 4] was a cross from which protruded the American flag, formed in the likeness of a human penis; tassels at the base of the cross were "probably a decorative or pubic hair" (89a-91a). Church flags and the Panama flag were

draped over the cross's horizontal and vertical pieces. In appellant's opinion, the message imparted by this sculpture was that there is no separation of church and state; that this government is involved in aggressive acts of war. The church flags indicated that the organized church either supports, leads or is being led by acts of aggression (91a). The work was priced at $1200, but was not sold (91a-92a). In his view, the artist was not being disrespectful toward the flag; he thought Morrel questioned the behavior of the government and organized religion in aggressive acts of war (92a).

Another of Morrel's works, which hung in his gallery's window, was made up of an American flag in the form of a body, suspended by a hangman's noose [depicted in People's Exhibits 1, 2, Defendant's Exh. A (49a)]. In the defendant's opinion, this sculpture illustrated Morrel's doubt whether the people of the United States are enjoying their constitutional rights (94a).

Hilton Kramer, art news editor of the *New York Times*, qualified as an expert witness after recounting his background in the field of art (98a-101a). In his opinion, "there is virtually no material which contemporary artists are not applying in some form or other * * * in a work of art" (101a). He "would define a work of visual art as any physical object specifically whose visual properties [are] specifically designed to communicate an aesthetic emotion" (101a); and "anything specifically designed to be a work of art, whether it's poor or high quality, is a work of art" (108a).

In the course of his newspaper responsibilities, Kramer received an announcement [Defendant's Exh. B] of the Morrel exhibit at the Radich Gallery, and in December 1966 he saw the exhibit at the gallery (101a-102a). In accord with his definition of art he considered Morrel's works art, and a "rather feeble" form of protest art (104a-105a, 108a); he also described Morrel's works as "ornamental sculpture" (107a). Though he was aware that Morrel intended to render some anti-war message, no political message was conveyed to him (108a-110a).

Summary of Argument

Appellant Stephen Radich was convicted of committing an "act" by which he cast contempt upon the American flag; he was not convicted for any verbal expression against the government or the flag, or for any expression of opposition to the government or its policies which his act may be deemed to have conveyed. For Radich chose to exhibit publicly in his art gallery certain "constructions" which employed the American flag in a contemptuous manner: One sculpture used the American flag to depict a penis and attached the penis to a cross draped with church flags; another sculpture, in the show window of the gallery visible from the street, used the flag to depict a human body hanging by the neck from a noose.

While Radich considered these items to be protest art, Radich himself had not constructed the items and was not himself seeking to communicate social protest by these works; his interest appeared primarily commercial: to exhibit what he considered art for the purpose of sale, for a commission. And, while the art news editor of the *New*

York Times, a defense witness, considered the items protest art, they conveyed no political message to him.

In any event, the First Amendment does not accord a nonverbal act which seeks to express an idea the same protection afforded a verbal expression of an idea. *Cox* v. *Louisiana,* 379 U.S. 536, 555 (1965); *Adderley* v. *Florida,* 385 U.S. 39 (1966); *United States* v. *O'Brien,* 391 U.S. 367 (1968). The First Amendment protects "speech" and "the press"; an actual flag in the form of a male sexual organ, or a hanging effigy, is neither "speech" nor "the press."

Consequently, since, as we shall demonstrate, there is a "sufficiently important governmental interest" in prohibiting conduct contemptuous of the flag, and since "the governmental interest is unrelated to the suppression of free expression," then—even if the conduct included expressive elements—"incidental limitations" on the latter were justified. *United States* v. *O'Brien, supra,* at 376-7.

That there exists a "sufficiently important governmental interest" in prohibiting conduct that treats the United States flag contemptuously in public was made evident by this Court in *Halter* v. *Nebraska,* 205 U.S. 34, 41-43 (1907), which recognized the public interest in preserving the integrity of the flag as a national symbol of unity and American ideals. This interest is reflected in the laws of Congress and 43 states prohibiting acts that cast contempt upon the flag, and in the remaining seven states forbidding various physical acts against the flag. The flag "is a special kind of personalty." *Street* v. *New York,* 394 U.S. 576, 616-617 (FORTAS, J. dissenting). The public may

prohibit its use as a medium of commercial advertising, or as a subject of open physical disgrace or shame; belonging to all the public, it has been dedicated to other purposes, just as the grounds near a courthouse or jail may be designated off limits for certain conduct, even conduct designed as a protest. See *Adderly* v. *Florida,* 385 U.S. 39, 47-48 (1966); *Cox* v. *Louisiana,* 379 U.S. 559 (1965).

The public interest in preventing public acts that desecrate the flag is especially clear where, as in this case, the dishonored flag is forced upon a captive audience. Appellant displayed the flag as a corpse hanging by the neck in the show window of his gallery facing an important city thoroughfare, for more than three weeks, in a manner calculated to catch the eyes of passers-by indiscriminately. This display collided with the rights of other citizens to use the street undistracted by unavoidable disturbing images of the honored national symbol. Such conduct is an "assault upon individual privacy," subject to reasonable regulation and prohibition. See *Redrup* v. *New York,* 386 U.S. 767, 769 (1967); *Close* v. *Lederle,* 424 F.2d 988 (1st Cir. 1970), *cert. denied* No. 332, Oct. Term, 1970; *People* v. *Stover,* 12 N.Y.2d 462 (1963), *appeal dismissed* 375 U.S. 42 (1962); *Kovacs* v. *Cooper,* 336 U.S. 77 (1949).

In addition, as the New York Court of Appeals held, the flag desecration statute promotes the important governmental interest of preventing "the outbreak of * * * violence by discouraging contemptuous and insulting treatment of the flag in public." See also *Halter* v. *Nebraska,* 205 U.S. 41-43 (1907); *People* v. *Street,* 20 N.Y.2d 231, 236 (1967), *rev'd on other gds.* 394 U.S. 576 (1969); *People* v. *Cowgill,* 274 Cal. App. 174, 78 Cal. Rptr. 853 (Cal. Super.

1969), *appeal dismissed,* 396 U.S. 371 (1970). That no actual violence may occur in a particular case, such as the present one, is a fortuitous circumstance that hardly negates the proposition that contemptuous use of the flag in public can be the occasion for violence and that the state may proscribe conduct that potentially breeds disorder without waiting until the violence erupts.

The governmental purposes envisioned by the statute are "unrelated to the suppression of free expression." Acts contemptuous of the flag are punishable regardless whether they are designed to express views, just as destruction of draft cards is punishable regardless whether the destruction was "engaged in for the purpose of expressing views." *United States* v. *O'Brien, supra,* at 375. The instant statute is neutral as to political expression—a disappointed "hawk" expressing by similar uses of the flag his contempt for American appeasement of "international communism" would also be covered by the statute. The law is aimed not at ideas, but at conduct; when it is applied to expressive conduct, it is applied not to ideas, but to the method of expressing them. Thus, the criminal complaint in this case, and the People's evidence, made no mention of expression or political views; only conduct was referred to. The "expressive" qualities alleged were brought out by appellant as a matter of defense. *Compare Street* v. *New York,* 394 U.S. 576 (1969). And, while acts contemptuous of the flag are justifiably prohibited, the citizen remains free verbally "to express publicly [his] opinions about our flag [or the draft], including those opinions which are defiant or contemptuous." *Street* v. *New York, supra,* at 593. Accordingly, the statute is distinguishable from those statutes or

administrative regulations whose object was either to suppress communication [*Stromberg* v. *California,* 283 U.S. 359 (1931) (prohibiting people from expressing their opposition to government by the display of a red flag); *Tinker* v. *Des Moines,* 393 U.S. 503 (1969) (prohibiting students from expressing their opposition to the Vietnam war by the wearing of black arm bands); *Schacht* v. *United States,* 398 U.S. 58 (1970) (prohibiting people from "speaking out against the role of our Army and our country in Vietnam")] or to "compel" an individual "to utter what is not in his mind." *West Virginia* v. *Barnette,* 319 U.S. 624, 634 (1943) (compulsory flag salute).

Further, that the statute prohibiting casting contempt upon the flag is not unconstitutionally vague, and that the exhibited works fall within the statutory proscriptions, cannot be doubted. A criminal statute is not void for vagueness if "men of common intelligence" are not "required to guess at the meaning of the enactment." *Winters* v. *New York,* 333 U.S. 507, 515 (1948). Fair, reasonable notice of the acts proscribed in terms readily understandable by men of average intelligence is required, not mathematical precision. Thus, men of ordinary intelligence would be able to understand what conduct "casts contempt" upon the American flag. This Court has often upheld language no more precise. See, *e.g., Beauharnais* v. *Illinois,* 343 U.S. 250 (1950) (group libel by exposure to "contempt, derision, or obloquy"); *Roth* v. *United States,* 354 U.S. 476, 491-492 (1957) ("obscene"); *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942) (concept of fighting words).

Another dispositive answer to appellant's allegation of vagueness is that it "is as clear as a pikestaff" that hang-

ing the American flag as a body and using it to form a male sexual organ emerged from pubic hair (91a) cast contempt on the flag; therefore, appellant may not be heard to complain that he was deprived of fair notice as to the meaning of the statute. *Williams* v. *United States,* 341 U.S. 97, 101, 104 (1951). Similarly, he may not complain, for the first time in this Court, that the statute might be applied to persons other than himself, whose conduct, such as unorthodox gestures toward the flag, may be constitutionally protected. The validity of the application of the statute to Radich does not depend upon validity of application in every hypothetical situation that the mind can conceive of, particularly since the New York appellate courts have not been called upon to determine whether the statute applies in those situations.

The knowing display of such objects need not be excused because the exhibitor's specific intent is other than contemptuous. The statute is properly malum prohibitum; the defendant is held to the natural consequences of his deliberate, knowing act of exhibiting items whose subject he was aware of and which were found contemptuous of the flag. In *Smith* v. *California,* 361 U.S. 147 (1959), upon which appellant relies, the state was prohibited from punishing a proprietor of a bookstore for exhibiting items whose subject matter he was unaware of. If the bookseller had been aware of the contents of the items, his subjective opinion that they were not obscene would have been immaterial.

Radich also alleges that the statute denies him equal protection, based on his erroneous reading of an exception contained in the statute for "ornamental pictures," and

newspapers and periodicals. Radich argues that this provision denies equal protection to sculptors and exhibitors of sculpture since it forbids him to use the flag contemptuously on ornamental sculpture, while permitting contemptuous use in other media. However, read in the context of the entire statute, the major portion of which seeks to prohibit the use of the flag in advertisements, it is quite clear that the exception is intended to permit only non-contemptuous use of the flag for certain purposes, when such use is "disconnected and apart from any advertisement," and legislative distinctions between contemptuous and non-contemptuous use of the flag do not result in a denial of equal protection. *See Halter* v. *Nebraska, supra.* Since Radich has been convicted of using the flag contemptuously, the exemption provision, properly construed, is not even here in issue.

POINT I

Conduct that publicly casts contempt upon the American flag by physical use of the flag is not protected by the First Amendment.

Appellant Stephen Radich was convicted of "acts" that publicly "cast contempt" upon the flag of the United States, under a statute providing that no person shall "publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon" the American flag, "either by word or act." Former N.Y. PENAL LAW §1425(16)(d), now N.Y. GEN. BUS. LAW §136(d). Although the criminal complaint filed against appellant, in setting forth the statute as a matter of form, included the term "word" as well as "act" (2a), he was prosecuted and convicted not for words, but for

publicly displaying constructions that misused the flag contemptuously. No words were alleged in the complaint, the charges being confined to his display of three-dimensional objects (2a-3a), and words formed no part of the People's evidence, although the defense evidence included reference to protest songs that were broadcast in the gallery during the exhibition. The opinion of the trial court, reflecting its findings of fact, limited culpability to the "constructions" (27a). Violation of the statute was found in the presentation in the display window facing Madison Avenue of "an American flag stuffed and shaped in a form suggesting a human body hanging from a yellow noose around its neck" (25a; Peo's Exhs. 1, 2; 41a-42a; Def's Exh. A; 49a). Among the 12 other constructions, inside the gallery, the trial court singled out the one displaying an American flag in the form of an erect penis protruding from the vertical standard of a cross (25a; Peo's Exhs. 3, 4, 42a). The finders of fact found "that these so-called 'constructions' constitute a contemptuous use of the flag of the United States and that the defendant by exhibiting them to the public cast contempt upon it in violation of paragraph (d) of the statute" (27a). The New York Court of Appeals upheld this finding, stating:

> "Whether defendant thinks so or not, a reasonable man would consider the wrapping of a phallic symbol with the flag an act of dishonor; he would consider the hanging effigy a dishonor; and to a lesser and more debatable extent it might be found that wrapping the flag in chains, attaching it to a gas meter, and fashioning the other representations involved, were acts dishonoring the flag. The exhibitor who, as in this case, engages to join the artist in the commercial exploita-

tion of the supposed expression of protest stands in no better position" (15a).

In *Street* v. *New York*, 394 U.S. 576 (1969), this Court left open the question whether the First Amendment permitted a prosecution for such conduct, the Court merely declaring that freedom of speech barred a conviction for casting contempt upon the flag by "word."

Appellant's attack on the constitutionality of the "act" provision draws into question not only the New York statute, which originated in 1899, but laws in all of the other states prohibiting desecration of the flag, and a recently enacted law of Congress making it a crime to knowingly "cast contempt" upon the United States flag by publicly mutilating, defacing, burning, or trampling upon it. 18 U.S.C. §700 (Supp. IV 1968). The federal legislation specifically does not pre-empt state legislation in the field. 18 U.S.C. §700(c). In 40 states, laws prohibit casting contempt upon the American flag by act; and laws in three other states, without using the word "contempt" or "contemptuous," prohibit conduct dishonoring the flag. The remaining seven states prohibit various specified physical acts against the flag.* One purpose of these laws is to preserve the integrity of the flag as a symbol of national unity under the Constitution.** The second purpose is to prevent

* Note, *Flag and the Law*, 4 VALPARAISO U. L. REV. 345, 362-367 (1970); *Desecration of the Flag, Hearings on H.R. 271 Before Subcomm. No. 4 of the House Comm. on the Judiciary, 90th Cong., 1st Sess., ser. 4*, 324-346 (1967).

** Ch. 54 [1917] Laws of N.Y. 106 (caption); 1943 Rep. of Att'y Gen. 90-91, 1941 Rep. of N.Y. Att'y Gen. 465, 51 N.Y.S. Dept. Rep. 240 (1934); Brief of N.Y. Att'y Gen. at 3, 4, *Street* v. *New York*, 394 U.S. 576 (1969); *Joyce* v. *United States*, 259 A2d 363 (D.C.App. 1969); *Hoffman* v. *United States*, 256 A2d 567 (D.C. App. 1969); *United States* v. *Ferguson*, 302 F.Supp. 1111 (N.D.Cal. 1969); see *Halter* v. *Nebraska*, 205 U.S. 34, 41-43 (1907).

the potential of public disorder occasioned by public displays of contempt toward a widely revered national symbol.*

Appellant's primary contention is that his conviction and the New York statute violate the First Amendment guarantee of freedom of speech. In reviewing such positions, this Court has distinguished "conduct" and "pure speech"; in this case we deal "not with free speech alone," but at most with "expression mixed with particular conduct." See *Cox* v. *Louisiana,* 379 U.S. 559, 564 (1965). Appellant's unsupported assertion that this case involves "pure speech" entitled to "maximum constitutional protection," and is governed by *Street* v. *New York,* is without merit (Brief for Appellant, p. 13, n.6). *Street* dealt with the "words" portion of the statute. And as this Court said in *United States* v. *O'Brien,* 391 U.S. 367, 376 (1968), "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech,' " even when "the person engaging in the conduct intends thereby to express an idea." Appellant's displaying of actual flags in the form of a male sexual organ and a dead body hanging by the neck was not "speech." Whatever communicative elements it may have had, the non-verbal elements were substantial, indeed overpowering—physical alteration, and the display of altered flags, propped with pulleys, ropes, and hung in a window and upon the floor. These displays, like the displays of armbands in *Tinker* v. *Des Moines School District,* 393 U.S. 503 (1969), were at most "symbolic acts." *Id.* at 505.

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* 9a-11a; *People* v. *Street,* 20 N.Y.2d 231 (1967), *rev'd,* 394 U.S. 576 (1969); *People* v. *Cowgill,* 274 Cal. App. 174, 78 Cal. Rptr. 853 (Cal. Super. 1969), *appeal dismissed,* 396 U.S. 371 (1970); *Halter* v. *Nebraska,* 205 U.S. 34, 41 (1907).

Reasonable regulation of symbolic acts or symbolic conduct is permissible under the First Amendment, "even though intertwined with expression." *Cox* v. *Louisiana, supra* at 563. A recent formulation of this principle appeared in *United States* v. *O'Brien, supra*:

> "This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms * * * [A] government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest."

Id. at 376-377; see also *Street* v. *New York,* 394 U.S. 576, 594-617 (1969) (dissenting opinions); *Tinker* v. *Des Moines School District, supra; Adderly* v. *Florida,* 385 U.S. 39 (1966); *Cox* v. *Louisiana, supra; Kovacs* v. *Cooper,* 336 U.S. 77 (1949). This case, we shall show, involves minimal expression, important public interests, and minimal, politically neutral limitations on expression, permitting reasonably adequate alternative means of communication.

The absence of an appreciable "expression" affected by the conviction of appellant is demonstrated by his candid concession at the trial that his interest in displaying the constructions was commercial, not political. Although appellant never claimed that he wished to convey political or social ideas or assist the artist, Marc Morrel, in that pur-

pose, his brief in this Court is written as if he were the artist. At trial he merely testified to his opinions about the artist's intention to express certain protests (82a, 91a-93a), but when asked by the court his purpose in displaying the constructions, he stated, "I displayed them because they were works of art and because [like] all other works of art in the gallery they were for sale" (94a-95a; see also 80a, 83a). The existence of a commercial rather than a political or social motive is relevant in assessing the validity of the application of a law to communications. *Valentine* v. *Chrestenson,* 316 U.S. 52 (1942) (commercial handbills distributed in the street; political text added as an evasion); *Breard* v. *Alexandria,* 341 U.S. 622, 641-645 (1951) (prohibition of door-to-door soliciting validly applied to salesmen of magazine subscriptions). Although a commercial intent is not always material when pure speech or freedom of the press is involved [see *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967); *Bantam Books* v. *Sullivan,* 372 U.S. 58, 64 n.6 (1963)], this case involves symbolic acts at most, not pure speech, and the actor's lack of an expressive purpose may be considered in assessing the expressiveness of his conduct and his claim to First Amendment protection.

Nor do the constructions, by themselves, convey a determinable thought or idea. Like the flag shirt in *People* v. *Cowgill,* 274 Cal. App. 174, 78 Cal. Reptr. 853 (Cal. Super. 1969), they display no "recognizable communicative aspect" of substance. See *Cowgill* v. *California,* 396 U.S. 371 (1970) (concurring opinion). Although this Court has not announced a test of the sufficiency of the communicative or expressive aspect of a course of conduct that would warrant application of the First Amendment, the Court has re-

jected a subjective test, based on the intent of the actor. *United States* v. *O'Brien, supra* at 376. We suggest an objective test: conduct has no sufficient communicative aspect warranting application of the First Amendment unless a reasonable man, reasonably well-informed, would understand its meaning—its alleged "speech" element—in the context in which it occurs. Thus, burning of a draft card publicly would bring into play the First Amendment [*cf. United States* v. *O'Brien, supra* at 376]; similarly, First Amendment principles did apply to the black armbands worn by the students in *Tinker,* since a reasonably well-informed member of the school community would have understood this as a gesture of protest against the Vietnam war. But in the present case even an unusually well-informed man, appellant's expert witness—the art news editor of the *New York Times,* formerly the art critic for the *New Leader,* a magazine of political and social commentary (98a)—saw no discernible political or social comment in the constructions (105a, 108a, 109a, 110a). While he concluded that the artist "probably intended to convey a political message," he was assisted in this inference by the anti-war songs playing on the sound track (109a). As to the construction hung in the display window —facing passers-by who were unaided by the sound track—the art critic "didn't take the work of art to be one that communicated a message exactly" (108a).

While the expression affected in this case was "minimal" (*cf.* 108a), the governmental interests served by the New York statute are important. Laws prohibiting public contemptuous treatment of the flag of the United States protect the integrity of the flag as a national symbol, "the emblem of our unity, our power, our thought and purpose

as a nation."* Perhaps this was the "major motivating factor" that the New York Court of Appeals alluded to in its opinion in this case (9a). As Mr. Justice FORTAS said in *Street* v. *New York*, 394 U.S. 576 (1969), "the flag is a special kind of personalty."

> "Its use is traditionally and universally subject to special rules and regulations. As early as 1907, this Court affirmed the constitutionality of a state statute making it a crime to use a representation of the United States flag for purposes of advertising. *Halter* v. *Nebraska*, 205 U.S. 34 (1907). Statutes prescribe how the flag may be displayed; how it may lawfully be disposed of; when, how and for what purposes it may and may not be used. See, *e.g.*, 4 U.S.C. §3; 56 Stat. 377, c. 435, 36 U.S.C. §§172-177. A person may 'own' a flag, but ownership is subject to special burdens and responsibilities. A flag may be property in a sense; but it is property burdened with peculiar obligations and restrictions." *Id.* at 616-617 (dissenting opinion).

Just as the grounds of a jail or the area near a courthouse may be declared off limits for protest [*Adderly* v. *Florida*, 385 U.S. 39, 47-48 (1966); *Cox* v. *Louisiana*, 379 U.S. 559 (1965)], so may the national flag; it has been "dedicated to other purposes" by the people. *Cf. Brown* v. *Louisiana*, 383 U.S. 131, 166 (1966) (BLACK, J., dissenting). It is the national trademark, not a private brand [*cf. Halter* v.

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* Woodrow Wilson, Flag Day address, June 14, 1917, quoted in QUAIFE, THE FLAG OF THE UNITED STATES 193 (1942); see also *Halter* v. *Nebraska*, 205 U.S. 34, 41-43 (1907); Lafayette, letter to John Adams (1786), quoted in 2 PREBLE, ORIGIN AND HISTORY OF THE AMERICAN FLAG, preface (1917); 4 ABRAHAM LINCOLN, COLLECTED WORKS 192, 219-220 (Basler ed. 1953); Francis Scott Key, The Star Spangled Banner, Henry Ward Beecher, address (1861), Ralph Waldo Emerson, Concord Hymn, collected in OUR FLAG (Schauffler ed. 1926); Holmes, C.J., Remarks, 178 Mass. 627 (1901); 36 U.S.C. §170.

Nebraska, supra at 39; 15 U.S.C. §1052(b)], and the public may restrict its use as a medium of commercial advertising or a physical target of disgrace or shame. It is national, and belongs to all the public.* Protection of this interest

* In an editorial on the most recent Flag Day, the *New York Times* stated:

> *"Thirty years ago today the conquering armies of the most powerful military dictatorship the world had ever known were sweeping through Western Europe under the hooked cross and blood-red banner of Nazi Germany. The flags of Norway, Denmark and the low countries had already been struck. On this very day in 1940 the swastika was for the first time unfurled atop the Eiffel Tower. The Battle of Britain was about to begin.*
>
> *"The American people were watching apprehensively, with every passing day of Nazi triumph, increasingly conscious of what our own democracy and our own flag meant to us. It was in this spirit and this atmosphere that Robert L. Duffus of the editorial board of The New York Times wrote the small classic reprinted below, which first appeared on this page on Flag Day, 1940.*
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> * * *
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> "'It is stories told. It is the Pilgrims dying in their first dreadful winter. It is the Minuteman standing his ground at Concord Bridge, and dying there. It is the Army in rags, sick, freezing, starving at Valley Forge. It is the wagons and the men on foot going westward over Cumberland Gap, floating down the great rivers, rolling over the great plains. It is the settler hacking fiercely at the primeval forest on his new, his own lands. It is Thoreau at Walden Pond, Lincoln at Cooper Union, and Lee riding home from Appomattox. It is corruption and disgrace, answered always by men who would not let the flag lie in the dust, who have stood up in every generation to fight for the old ideals and the old rights, at risk of ruin or of life itself.
>
> "'It is a great multitude of people on pilgrimage, common and ordinary people, charged with the usual human failings, yet filled with such a hope as never caught the imaginations and the hearts of any nation on earth before. The hope of liberty. The hope of justice. The hope of a land in which a man can stand straight, without fear, without rancor.
>
> "'The land and the people and the flag—the land a continent, the people of every race, the flag a symbol of what humanity may aspire to when the wars are over and the barriers are down; to these each generation must be dedicated and con-

is not limited to Congress, but may be offered by the states, which are "indissolubly connected" with the Union. *Halter* v. *Nebraska,* 205 U.S. 34, 43 (1907). Thus, in *Street* v. *New York,* four members of this Court indicated that "the States and the Federal Government do haye the power to protect the flag from acts of desecration and disgrace." See 394 U.S. at 605 (WARREN, C.J., dissenting).

Such protection is not, as appellant contends, "compelling veneration" of the flag (Brief for Appellant, p. 14), any more than laws prohibiting mutilation of draft cards, coins or paper currency [see 18 U.S.C. §§331, 333] compel "veneration" of those objects. This case is distinguishable from *West Virginia Board of Education* v. *Barnette,* 319 U.S. 624 (1943), which held that a state may not compel a salute to the flag. *Barnette* involved "compulsion of students to declare a belief" [*id.* at 633]; the flag desecration law at issue leaves appellant free to refrain from conduct and affirmation of belief, and allows him to speak

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secrated anew, to defend with life itself, if need be, but, above all, in friendliness, in hope, in courage, to live for.'

* * *

"This was the meaning of the flag thirty years ago; this is the meaning of the flag today. But it is a measure of the bitter divisions of the era in which we live that the symbolism of that flag should have become distorted and degraded by the partisan extremists of both New Left and Old Right. The flag must not be captured either by the repressive legions of the right who employ it daily to prove they are for Agnew and against the students; nor must its meaning be destroyed by the frustrated demagogues of the left who find a cheap and easy outlet by reviling it and dragging it in the dust. The flag is a symbol of the unity of America. We must not allow it to be perverted by the forces of disunity, whether the Birchers or Weathermen, that today are abroad in this land." N.Y. Times, June 14, 1970, p. 16, col. 1 (Emphasis in original).

contemptuously of the flag. He merely must abstain from publicly desecrating it.

The governmental interest in preserving the integrity of this emblem is particularly strong where, as in this case, the disgraced flag is thrust upon a captive audience. This Court has rejected "the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." *Adderly* v. *Florida,* 385 U.S. 39, 47-48 (1966). For more than three weeks (78a), Radich displayed the flag as a cadaver hung by the neck, in the window of his gallery facing a busy city street, in a manner designed to draw the attention of passing pedestrians, motorists and bus passengers (Peo's Exhs. 1, 2, Def's Exh. A). The effigy was evidently calculated to shock the viewer; surely it was offensive to many passers-by. Appellant's alleged right to present an artist's symbolic protest conflicted with the rights of others, adults and children, to use the street undistracted by an eye-catching, unavoidable image, larger than life, of the respected symbol of America hanging like a corpse.

As the Court of Appeals suggested, the range of this brightly colored display on the second floor of the building was greater than that of a sidewalk speaker (9a-10a), whose harangue can be avoided by crossing the street or walking in a wide arc around the soapbox. To respecters of the flag, or citizens for whom it had special significance, perhaps because of the loss of a relative in the Armed Forces, or of an honored national leader, the harm was instantaneous, inflicted as soon as the effigy was seen. Regulation of such displays does not infringe freedom of speech. As has been said in a similar context:

> "Where a shock effect is produced by forcing an 'obscene' communication upon a person contrary to his wishes, the issue is somewhat similar to that involved in private defamation. The harm is direct, immediate and not controllable by regulating subsequent action. The conduct can realistically be considered an 'assault' on the other person, and hence placed within the category of 'action.' Issues of this sort arise, of course, only in limited situations such as where the communication is displayed publicly on a billboard, or sent into a private home through the mail. Regulations can be devised to deal with this matter that do not create serious administrative problems. Under the circumstances, restriction of communications of this nature would not be inconsistent with the first amendment." Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 938-939 (1963).

This sound rationale was applied in *Close* v. *Lederle*, 424 F.2d 988 (1st Cir. 1970), *cert. denied*, —— U.S. ——, No. 332, Oct. Term 1970, to uphold the removal of an art instructor's paintings from the walls of a corridor of a university building, although the art was not legally obscene. It depicted male or female nudes displaying the genitalia in clinical detail, and bore cheap titles. "Where there was, in effect, a captive audience," including children who regularly used the corridor, the school authorities "had a right to afford protection against 'assault upon individual privacy,' *see Redrup* v. *New York*, 1967, 386 U.S. 767, 769 * * *"* In *People* v. *Stover*, 12 N.Y.2d 462 (1963), *appeal dismissed*, 375 U.S. 42 (1963), this Court found no substan-

* In *Redrup* the Court spoke of "an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. *Cf. Breard* v. *Alexandria*, 341 U.S. 622; *Public Utilities Commission* v. *Pollak*, 343 U.S. 451."

tial federal question raised by the application of an ordinance, prohibiting the maintenance of a clothesline in a yard abutting a street, to appellants' clothesline filled with old clothes and rags, which they displayed as a peaceful protest against the high taxes imposed by the town. Judge FULD had noted that the ordinance, apparently passed in response to appellants' flamboyant protest, was validly "designed to proscribe conduct which offends the sensibilities." 12 NY2d at 470. The rule that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers" [see *Bachellar* v. *Maryland*, 397 U.S. 564, 567 (1970)] has no application to such a case, or to Radich's. Here, as in *Stover*, "any shock effect caused" was attributable not to "the content of the ideas being expressed" [*ibid.*]—it is doubtful that any "ideas" were conveyed to the average passerby—but to the method of expressing them. Similarly, in the interest of protecting individual privacy from verbal assaults, *Kovacs* v. *Cooper*, 336 U.S. 77, 81, 86-89 (1949) upheld a prohibition against loudspeakers emitting "loud and raucous noises," even as applied to political messages. This approach does not impair freedom of expression. Appellant "may express his opinions," or Marc Morrel's, "on controversial subjects like the conflict in Vietnam, if he does so * * * without colliding with the rights of others." See *Tinker* v. *Des Moines School District*, 393 U.S. 503, 513 (1969); see also *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 630 (1943).

Thus, the application of the statute to the display in the show window is clearly consistent with the First Amendment. Nor is appellant's conviction vitiated

because the statute does not expressly limit its coverage to contemptuous conduct before a captive audience. First, as is discussed throughout this brief, the legislation may validly be applied to public contempt even before a voluntary audience.

Even if the First Amendment were deemed to preclude the application of the statute to conduct before a voluntary audience, the conviction still would survive. The findings of the trial court and of the Court of Appeals show that the effigy in the window was a separate basis of the conviction (9a, 15a, 25a, 27a); in *Street* v. *New York*, by contrast, the generality of the complaint, of the People's evidence, and of the verdict led this Court to conclude that the verdict might have been based upon constitutionally protected behavior, the defendant's words. Moreover, the statute did not have to specify the theory of unwilling audience. The trespass statute in *Adderly* v. *Florida*, 385 U.S. 39 (1966), was validly applied to non-violent protests on jail grounds, even though it was not limited in terms to such property. See also *United States* v. *Petrillo*, 332 U.S. 1, 212 (1947). In many situations where the First Amendment is applicable, the statute may be validly applied if certain facts obtain, even though the statute does not specify these constitutional conditions for prosecution. See *Ginzburg* v. *United States*, 383 U.S. 463 (1966) (evidence of pandering in obscenity prosecution); *Dennis* v. *United States*, 341 U.S. 494, 513-515 (1951) (in prosecution for conspiracy to advocate violent overthrow, clear and present danger test is not an element of the crime, but a "judicial measure of constitutional applicability," which the trial court alone may rule on).

Not only is there an important public interest in preserving the flag as a national symbol, free from public disgrace, but this interest is "unrelated to the suppression of free expression," and "the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest." See *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). While the flag is to be preserved, and is off limits for disgracing acts, no topic is proscribed; the regulation is unrelated to "the prohibition of expression of one particular opinion." Compare *Tinker* v. *Des Moines School District, supra* at 511. Although appellant's argument associates contemptuous misuse of the flag specifically with the expression of sentiment against the Vietnam war, the statute by its terms conveys no such meaning. It is an accident of history that in some quarters the flag currently brings to mind a hawkish position on a war, or right-wing politics. But the statute was enacted long before these controversies arose. It is neutral on political matters, like the flag. A disappointed hawk, expressing by a lynched flag, or a drooping flag-penis, his protest against American troop withdrawals, bombing halts, ceasefires or truces (all of which occurred or were contemplated in the fall of 1966, shortly before appellant's exhibition),* would also be violating the statute.

Pure free-floating "contempt," the subject of the statute, is "expression" in a broad sense, but not in the sense contemplated by the First Amendment; notwithstanding its recurrent use as a medium of political expression, "there is nothing necessarily expressive about such conduct." See

* *N.Y. Times*, Oct. 1, 1966, p. 1, col. 2, Oct. 23, p. 1, col. 1, Oct. 26, p. 1, col. 1, Nov. 24, p. 1, col. 1, Nov. 27, p. 1, col. 8, Dec. 14, p. 1, col. 7.

United States v. *O'Brien, supra* at 376. Indeed, knowingly destroying or mutilating a draft card shows contempt for the draft system, but the statute prohibiting such willful conduct is unrelated to the suppression of "expression" in terms of the First Amendment. *Ibid.* Similarly, public desecration of the flag, unless explained, conveys no particular meaning. If it is explained as a protest, the violation of the flag is merely incidental to the thought conveyed, and is simply an act dramatizing it. But the statute applies to the "act," not the explanation. Thus, hanging a flag covered with paint out of a window facing a public street, as occurred in *People* v. *Verch*, 63 Misc.2d 477 (Ct. Spec. Sess. 1970), may cast contempt on it, but no communicative aspect inheres in the act alone. Prosecutions under the flag desecration law would properly be aimed at the non-expressive, physical elements of this conduct.

In *Stromberg* v. *California*, 283 U.S. 359 (1931), on the other hand, the statute prohibited the display of a red flag for the purpose of expressing opposition to organized governments; whatever governmental interest was furthered by this law, it was directly related by the statutory terms to the suppression of free expression. The same is true of *Schacht* v. *United States*, 398 U.S. 58 (1970). The statute there permitted use of an American military uniform only in a theatrical performance, "if the portrayal does not tend to discredit" the Armed Service. The supposed governmental interest furthered by this law inherently involved the suppression of pure speech; Congress "in effect made it a crime for an actor wearing a military uniform to say things during his performance critical of the conduct or policies of the Armed Forces." *Id.* at 62-63. Moreover,

there is no valid governmental interest in protecting the military services from discredit.

The second governmental interest served by the statute —the purpose discussed by the New York Court of Appeals (9a)—is the prevention of breaches of the peace.

> "[I]t is within the realm of legislative judgment to find that some types of public flag desecration will be as provocative to many viewers as the kind of personal insult which is often followed by violence. That the state has a substantial interest in preventing a resulting breach of the peace and that the police power is the proper foundation for legislation directly toward that end is well settled doctrine." *Crosson* v. *Silver*, —— F.Supp. ——, No. Civil 70-79 Tucson (D.Ariz. Nov. 13, 1970).

And as Chief Judge FULD stated in *Street*, "Violation of the statute may not be condoned * * * because no violence actually did occur." 20 N.Y.2d at 237. Comparing the present case to *Street*, the Court of Appeals found:

> "Here, the expression, if less dramatic, was given far wider public circulation and, in consequence, perhaps, a measurable enhancement of the likelihood of incitement to disorder, by the placement of one of the constructions in a display window of defendant's gallery on Madison Avenue in the City of New York, and the exhibition and exposure for sale of the companion pieces in the public gallery and mercantile establishment within. Implicit in the invitation to view was the opportunity thereby afforded to join in the protest, or in counter-protest, with the consequent potential of public disorder; or so the trier of facts could properly find" (9a-10a).

The triers of the facts did find evidence of a threat to public order:

"In *Halter* v. *Nebraska*, 205 U.S. 34, 41, the Supreme Court, in upholding a statute similar to that involved here as applied to the use of the flag in advertising said:

> 'From the earliest period in the history of the human race, banners, standards and ensigns have been adopted as symbols of the power and history of the peoples who bore them. * * * Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot.'

It seems to us that the prohibited use of the flag in advertising is less a desecration and therefore less of a threat to public order than the use and exhibition of it in the so-called 'constructions' here involved" (29a).

Appellant contends that the state courts have ruled in effect that casting contempt on the flag in public "creates an irrebuttable presumption that a breach of the peace will follow" (Brief for Appellant, p. 16). In so urging, appellant ignores the other governmental interest protected by the statute, preservation of the flag as a national symbol. Moreover, the contention is unsound even as to the interest of preventing a breach of the peace. As to this, the statute at most reflects a reasonable presumption that a breach of the peace is likely to follow acts that cast contempt on the flag in public. The reasonableness of this expectation is reflected in the enactment of similar laws throughout the country, and it was expressed by this Court in *Halter* v. *Nebraska*. See also *People* v. *Cowgill*, 274 Cal. App. 174, 78 Cal. Rptr. 853 (Cal. Super. 1969), *appeal dismissed*, 396 U.S. 371 (1970). *Street* v. *New York* is not to the contrary, since the opinion in that case dealt with culpability for

words, not merely physical desecration of the flag in public. No doubt, many New Yorkers could resist even "fighting words" [*cf. Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942)], just as they resisted appellant's display. But the expectation of danger from his indiscriminate display on Madison Avenue to a large, undifferentiated, audience for three continuous weeks is reasonable. Indeed, disturbances in the Wall Street and City Hall areas of Manhattan this spring, associated with allegations of mistreatment of the flag, illustrate the provocative quality of such conduct.* Except for showing that no breach of the peace actually occurred, appellant made no offer to rebut the reasonableness of this expectation. In *Cox* v. *Louisiana,* 379 U.S. 559 (1965), this Court, in holding that the First Amendment did not protect orderly picketing near a courthouse with intent to impede the administration of justice, upheld "a legislative determination based on experience that such conduct inherently threatens the judicial process' [*id.* at 566], even though no evidence of a breach of the peace or a threat to the judicial process was introduced at the trial.

Appellant argues that acceptance of the breach-of-the-peace interest justifies a "heckler's veto," but he misses the point. The interest is to prevent disorderly reaction not to ideas or views expressed, but to physical acts themselves, regardless of the views of the actor; that these contemptuous uses of the flag may have communicative aspects is no bar to legislation directed at the acts. The "state interest in preventing breaches of the peace is, in the flag desecration context, unrelated to the suppression

* *Cf.* "Indict Wall St. Hardhat," N.Y. *Post,* May 22, 1970, p. 1, col. 3; N.Y. *Daily News,* May 9, 1970 (centerfold); *N.Y. Times,* May 12, 1970, p. 18, col. 2.

of free expression. The interest is affected, not by the speech element of the conduct," but by the emotional impact of the "non speech element." *Crosson* v. *Silver*, —— F.Supp. ——, No. Civil 70-79 Tucson (D.Ariz. Nov. 13, 1970). Moreover, the incidental restriction on the alleged communicative value of the act is no greater than essential to further that interest, in view of the reasonable legislative determination that such conduct inherently risks disorder. Therefore, the holding in *Crosson* v. *Silver, supra,* that the Uniform Law against flag desecration, which has been enacted in New York and 28 other states [note, *Flag and the Law,* 4 VALPARAISO L. REV. 345, 361-367 (1970)], is unconstitutional because not expressly limited to desecrations that tend to cause breaches of the peace, is incorrect; indeed, the logical outcome of this holding is that all state and federal laws against publicly mutilating or trampling upon the flag are void. Such cavalier rejection of the public interest is unjustified.

Disturbing physical acts such as these, and the displays in the case at bar, are closely akin to the "insulting or 'fighting' words" [*Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942)], "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Such utterances "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution * * *' " *Id.* at 571-572. A flag-corpse and a flag-phallus publicly flaunted are "epi-

thets," not in any proper sense "communication of information or opinion safeguarded by the Constitution." Unlike speech, they do not appeal "to good sense and to 'the power of reason, as applied through public discussion.'" See *Garner* v. *Louisiana,* 368 U.S. 157, 201 (1961) (HARLAN, J. concurring). They "inflict injury" without peaceful recourse.

Contrary to the implications of the briefs filed by appellant and *amici curiae,* artists have no favored position under the First Amendment. The framers of the First Amendment, men of extraordinary learning and culture, wrote not of art but of speech. That the statute has been applied to works of art in this case is relevant only in determining whether the contemptuous acts in question had communicative elements that bring the First Amendment into play. Under narrow circumstances, art may be limited by government, incidental to the protection of interests unrelated to the suppression of expression. Thus, it does not further the discussion to complain, as *amici* have, that "If the conviction below is upheld by this Court, the traditional practice of artists expressing themselves on controversial subjects through materials and symbols appropriate to the subject, will be limited" (Brief of *Amici Curiae,* p. 8). An artist may not, to protest war, make a collage of mutilated draft cards, or, in the manner of Gulley Jimson, use the base of the Washington Monument for a mural,* however "appropriate" these materials would be to the subject. Nor may they publicly desecrate the American flag, although they may use it otherwise (see Brief of *Amici Curiae* at Appendix). Such limitations, however, are mini-

* *Cf.* JOYCE CARY, THE HORSE'S MOUTH.

mal. Creative artists have other means to express protest, means that do not conflict with the rights of others to free enjoyment of the national symbol in an orderly atmosphere.

POINT II

The flag statute is not void for vagueness or overbreadth.

Appellant, convicted under a statute that makes it a crime to "publicly * * * cast contempt upon" the American flag by an "act," attacks the phrase "cast contempt" as unconstitutionally vague from two standpoints; first, that it does not give fair notice of the conduct condemned, and second, that it encompasses acts that are protected by the First Amendment and is thus impermissibly overbroad.

A criminal statute is not void for lack of an ascertainable standard of guilt if "men of common intelligence" are not "required to guess at the meaning of the enactment." *Winters* v. *New York*, 333 U.S. 507, 515 (1948); *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). Fair, reasonable notice of the forbidden acts in terms that permit a man of average intelligence to "reasonably understand that his contemplated conduct is proscribed" is all that is required. *United States* v. *National Dairy Corp.*, 372 U.S. 29, 32-3 (1963); *Roth* v. *United States*, 354 U.S. 476, 491-2 (1957). "That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense." *Roth* v. *United States, supra; United States* v. *National Dairy Corp., supra; United States* v. *Harriss*, 347

U.S. 612, 618 (1954). For, "whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk." *United States* v. *Wurzbach,* 280 U.S. 396, 399 (1930); *Nash* v. *United States,* 229 U.S. 373, 377 (1913).

In the instant case, due regard for the intelligence of a reasonable man requires accepting his ability to discern acts contemptuous of a person or thing. Simply understood, an act will "cast contempt" upon the flag when it is apparent to a reasonable man under the circumstances surrounding the commission of the act—for example, mutilation—that the flag is the object of scorn, shame, dishonor, or disgrace, or presented as low, vile, or worthless. *See,* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, Unabridged (1969); THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, College Edition (1968); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1969).

Appellant's argument that the term is ambiguous because persons who hold political beliefs allegedly represented by the flag mutilations in question would find them not contemptuous, completely misses its mark. Contemptuousness can hardly be judged by the persons who espouse the particular use that is the subject of such a determination. Contemptuousness is here judged by the eye of a reasonable man, regardless of political beliefs. That different juries may reach opposite conclusions as to the same act does not make the statute imprecise; "it is

common experience that different juries may reach different results under any criminal statute." *Roth* v. *United States, supra,* 354 U.S. 476, 492 n. (1957). Although the reasonable man must exercise his judgment on the factual question of contempt, that does not of itself create ambiguity; a determination of contemptuousness is no greater a challenge than, for example, a determination of conduct as reasonable or unreasonable. *See, United States* v. *Ragen,* 314 U.S. 513, 523 (1942); *Adderly* v. *Florida,* 385 U.S. 39, 42-3 (1966); *United States* v. *National Dairy Corp.,* 372 U.S. 29, 32-3 (1963); *Cameron* v. *Johnson,* 390 U.S. 611, 616 (1968). Realistically, a residuum of doubt unavoidably shrouds borderline conduct. *See, Ginzburg* v. *United States,* 383 U.S. 463, 475 n. 19 (1966). But reasonable men throughout their lives encounter, experience, and are capable of judging conduct contemptuous of themselves, others, and things. And, while one may choose to applaud flag mutilations, if one is sympathetic with contemptuous acts against the flag, one could hardly doubt their contemptuousness where the flag is hung in effigy and represented as a phallus. Men of all political persuasions may agree that certain uses of the flag are objectively contemptuous.

In *Beauharnais* v. *Illinois,* 343 U.S. 250 (1952) this Court sustained against a challenge for vagueness a criminal group libel statute which as an element of the crime required that the publication or exhibition in question expose "the citizens of any race, color, creed or religion to contempt, derision, or obloquy." Comparable examples of statutory language which this Court has found to give sufficient notice of the act proscribed are many indeed.

Cameron v. *Johnson, supra,* 390 U.S. 611, 616 (1968) ("obstruct" and "unreasonably interfere"); *Adderly* v. *Florida, supra,* 385 U.S. 39, 42-3 (1966) ("with a malicious and mischievous intent"); *United States* v. *National Dairy Corp., supra,* 372 U.S. 29, 32-3 (1963) ("unreasonably low prices for the purpose of destroying competition or eliminating a competitor"); *Roth* v. *United States, supra,* 354 U.S. 476, 491-2 (1957) ("obscene"); *Williams* v. *United States,* 341 U.S. 97 (1951) ("rights, privileges, or immunities secured or protected by the Constitution" and "under color" of law); *Jordan* v. *De George,* 341 U.S. 223, 230-2 (1951) ("crime involving moral turpitude"); *United States* v. *Petrillo,* 332 U.S. 1, 6-8 (1947) (to coerce a license to hire employees "in excess of the number of employees needed by such licensee to perform actual services"); *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942) ("any offensive, derisive or annoying word"); additional examples are cited in *Jordan* v. *De George, supra* at 231 n. 15. Thus, given the unavoidable imprecision of language and the need for legislatures to draw statutes that are not so unduly narrow as to allow easy opportunities "to nullify the purposes of the legislation" [*Winters* v. *New York, supra,* 333 U.S. 507, 524-5 (1948) (dissenting opinion)], this Court has clearly expressed a reluctance to void statutes that draw a line that, as here, can fairly be recognized as it is approached. Appellant's heavy reliance upon *Joseph Burstyn Inc.* v. *Wilson,* 343 U.S. 495 (1952) is misplaced. *Burstyn* involved a statute that permitted the banning of a motion picture found "sacrilegious" of "religion." The holding of the Court was that the term "sacrilegious" permitted the state to effect a prior restraint on the expression of views

distasteful to any or all religions, and that from the standpoint of freedom of speech the state had "no legitimate interest" in so protecting religions. *Id.* at 505. The vagueness that inhered in the term sacrilegious stemmed from its application to a historically ambiguous object: religion. "What might have been definite when a controlling church imposed a detailed scheme of observances becomes impossibly confused and uncertain when hundreds of sects, with widely disparate and often directly conflicting ideas of sacredness, enjoy, without discrimination and in equal measure, constitutionally guaranteed religious freedom." *Id.* at 528 (concurring opinion). The object to which the act of contemptuousness is directed in the instant case is the American flag, not the varying political beliefs of Americans.*

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* The dispositions of the cases cited by appellant in a footnote (Brief of Appellant, pp. 25-6) are instructive.

The case against the defendant in *People* v. *Pregaskis* was dismissed on December 9, 1970 in the Town Justice Court, Town of Claverack, Columbia County, New York.

The case against the defendant in *People* v. *Hubner* was dismissed on March 17, 1970 in the District Court, Nassau County, New York. *See, N.Y.L.J.*, March 18, 1970, p. 1, col. 3. While the District Attorney filed a notice of appeal in the *Hubner* case, on August 11, 1970 he withdrew the appeal.

In *Long Island Vietnam Moratorium Comm.* v. *Cahn*, —— F.2d —— (2d Cir., Slip Opn. 328, Dec. 1970), the defendants were charged with a violation of subdivision "a" of the statute—a provision not here in question. In any event, the defendants were victorious. *Ibid.* Further, the District Attorney of Nassau County neither acted improperly in seeking to enforce the statute nor evidenced any political bias. *See New York Times*, January 16, 1970, p. 17, cols. 1-2. The District Attorney, acting on a complaint, indicated his conscientious belief that writing or symbols superimposed upon the flag violated the law, that he "must enforce the law as it is written and as it is determined by the courts," that he would prosecute, "so that the courts can make the final determination," the use of peace symbols placed over the flag as well as displays of the flag with the inscription "Love it or leave it," since he was acting as a law enforcement office and "not because of any political persuasion." *Ibid.* When federal declaratory judgment relief was sought the prosecutor pledged to refrain from prosecution pending the outcome.

In any event, whatever may be said about judging marginal cases of contemptuous conduct, no one could hang a flag in effigy or display it as a penis protruding from pubic hair (91a) and not realize that he had passed the line of authorized conduct. "[I]t therefore strains at technicalities to say that any issue of vagueness of the [statute] as construed and applied is present in the case." *Williams* v. *United States*, 341 U.S. 97, 104 (1951). Conduct so squarely prohibited under any construction of the term does not admit of an argument that fair notice of the act proscribed was not given. *Fox* v. *Washington*, 236 U.S. 273, 277 (1915); *United States* v. *Wurzbach*, 280 U.S. 396, 399 (1930); *Kovacs* v. *Cooper*, 336 U.S. 77, 97 (1949) (concurring opinion); *Jordan* v. *De George*, *supra* 341 U.S. 223, 231-2 (1951); *Williams* v. *United States*, *supra*, 341 U.S. 97 (1951); *United States* v. *Harriss*, 347 U.S. 612, 618 (1954); *Dennis* v. *United States*, 341 U.S. 494, 515-6 (1951); *Scales* v. *United States*, 367 U.S. 203, 223 (1961); *Ginzburg* v. *United States*, *supra*, 383 U.S. 463, 475 n. 19 (1966); *see New York ex rel. Hatch* v. *Reardon*, 204 U.S. 152, 160-1 (1907); *Dombrowski* v. *Pfister*, 380 U.S. 479, 491-2 (1965); *Golden* v. *Zwickler*, 394 U.S. 103, 110 (1969).

Radich's further claim, that the definition of an American flag within the meaning of the statute is vague, is frivolous. The statute is quite detailed in its description and while it may encompass many varied representations of the flag, it is hardly vague. And, as the cases just cited show, since appellant was convicted for contemptuous use of an actual American flag, it is ridiculous for him to claim lack of fair notice that such was within the scope of the statute.

Similarly, it is of no avail for Radich to argue that the statute is impermissibly overbroad where his acts were of the "hard core" type that would be prohibited under any construction of the statute and were not privileged under the Constitution. His contention is apparently that even if his conduct—based on the actual mutilation of a flag—is not constitutionally protected, he is certain, for some unexplained reason, that other forms of conduct—such as "unorthodox gestures aimed at the flag" and "flying one's flag at half mast"—would be both included within the statutory proscription and constitutionally protected; therefore, as the "vicarious champion" [see *United States* v. *Dennis,* 183 F.2d 201, 214 (2d Cir. 1950) (L. HAND, J.), *aff'd,* 341 U.S. 494 (1951).] of those he believes patently protected by the Constitution, he claims to be absolved from the consequences of his patently unprotected conduct. The law cannot countenance such a result.

The methodology of determining vagueness in terms of overbreadth can be somewhat elusive and mystifying, even where the specific actions in question approach the borderline of constitutionally protected conduct. Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. PA. L. REV. 67 (1960); Note, *The First Amendment Overbreadth Doctrine,* 83 HARV. L. REV. 844 (1970). But where, as here, the litigant's conduct could not be protected under the Constitution, it flies in the face of rational and judicial analysis to ask the Court then to set adrift to find any number of hypothetical situations the statute may be thought someday to be applied to, then to determine the constitutionality of such application, and finally, if one hypothetical application would be uncon-

stitutional, to declare the entire statute void even as applied to the unprotected conduct. "The constitutional question, First Amendment or otherwise, must be presented in the context of a specific live grievance * * * 'A hypothetical threat is not enough.'" *Golden* v. *Zwickler*, 394 U.S. 103, 110 (1969). It makes a mockery of law to permit one who has engaged in hard-core conduct to assert that the statute might be applied in some hypothetical fashion to prohibit the exercise of some constitutionally protected conduct of a class of individuals to which he clearly does not belong. *Cf. Bryson* v. *United States*, 396 U.S. 64 (1969); *United States* v. *Knox*, 396 U.S. 77 (1969). For, "it requires no great feat of imagination to envision situations" in which many penal statutes might conceivably be applied unconstitutionally. *Shuttlesworth* v. *Birmingham*, 382 U.S. 87, 91 (1965). But the remedy is hardly to strike down the statute as applied to the "hard-core" conduct specifically in question. Statutes that admit of varying and different applications carry with them an implicit proviso that no application shall be made to constitutionally protected conduct and that the varying applications are separable should one of them be found unconstitutional. In short, "it seems quite reasonable * * * that if the * * * legislature had known it could not have all it wanted, it would have wanted all it could have." *Samuels* v. *Mackell*, 288 F.Supp. 348 (S.D.N.Y. 1968) (FRIENDLY, J., for three-judge court), *prob. juris. noted*, 393 U.S. 975 (1968), *restored to cal. for rearg.*, 395 U.S. 957 (1969), 399 U.S. 922 (1970). Thus, a judicial finding that a particular application of a statute would be unconstitutional does not require that the statute be voided even as to applications that clearly come within the statute and are not constitutionally protected. *See Street* v. *New*

York, 394 U.S. 576 (1969). Further, if any individual is threatened by an application of statute to conduct he believes is constitutionally protected, he may, in addition to any state remedy he may have [see N. Y. CPLR §3001; *Fenster* v. *Leary,* 20 N.Y.2d 309 (1967)], seek a speedy determination from the federal courts that the particular application of the statute in question may not constitutionally be made. *See Dombrowski* v. *Pfister, supra; Cameron* v. *Johnson, supra; Zwickler* v. *Koota,* 389 U.S. 241 (1967).

Moreover, in the case at bar, it is not clear that the New York Court of Appeals was ever properly presented with and passed upon a question of overbreadth as to the conduct covered. Appellant's brief in the Court of Appeals appeared addressed solely to vagueness as a question of fair notice; no hypothetical examples of overbreadth were presented the Court of Appeals as they are presented to this Court. Accordingly, appellee's brief in the Court of Appeals addressed itself solely to vagueness as a question of fair notice. That court, while passing on all issues raised by appellant, was silent as to overbreadth. Indeed, the appellate courts of New York have not passed upon the situations now conjured by appellant, and have not indicated whether they would uphold prosecutions for such conduct, as a matter of statutory interpretation or constitutional law. Thus, the question of overbreadth in terms of the conduct proscribed is not properly before this Court. *Street* v. *New York, supra,* at 581-2.

In arguing the statute's overbreadth, Radich claims that the Court of Appeals's holding that the statute did not require proof of a specific intent by the actor to cast contempt

upon the flag, would result in a substantial restriction on the freedom of speech. We disagree.

To begin with, the Court of Appeals appears to have been primarily concerned that the statute would not become the focal point either for the suppression of protected speech or for the evaluation of political beliefs. Thus, in deciding whether the defense of subjective good faith motivation of the actor excused conduct objectively contemptuous of the flag, the Court of Appeals held motives, specific intent, irrelevant and the act *malum prohibitum*. But in so holding the court did not eliminate the basic requirement that a deliberate act, objectively contemptuous, must be committed. As explained in *State* v. *Schlueter*, 127 N.J.L. 496, 23 A.2d 249, 250 (N.J. 1941), although the statute did not require commission of the act with a specific intent, "the statute, in making it a misdemeanor to deface or to defile the flag, used those words in their meaning of 'dishonor'. 'Dishonor' is purposeful * * * For illustration: A blind man stumbles over the flag and, not knowing what it is, walks upon it and then casts it aside. Has he 'trampled' upon the flag? Has he 'defaced' or 'defiled' it? Has he 'dishonored' it? [Has he cast contempt upon it?] We think not; because those words carry with them, by inherent meaning, an attitude of mind which is wholly lacking in the supposed instance." Similarly, in *United States* v. *O'Brien*, 391 U.S. 367 (1968) once the deliberate act of burning one's draft card was proven, the First Amendment did not require that the defendant be accorded the defense of good faith political motives. In *Chaplinsky* v. *New Hampshire, supra*, 315 U.S. 568, 574 (1942) in upholding a statute that punished the defendant for the

expression of "fighting words," the court also held that preclusion of a defense of "provocation and * * * truth or falsity of the utterances is open to no Constitutional objection." No specific intent to provoke a breach of the peace was constitutionally required, only the utterance of words objectively "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." Thus, the statute bound Radich to the natural consequences of his deliberate, knowing act of exhibiting items whose subject he was aware of and which were objectively contemptuous of the flag.

Smith v. *California,* 361 U.S. 147 (1959), relied upon by appellant, is not apposite once it is understood that the instant statute requires knowledge of the subject matter of the act and the commission of the act. Smith, the proprietor of a bookstore, was punished for exhibiting items whose subject matter he was unaware of. If he had been aware of the contents of the items, his subjective opinion that they were not obscene under the decision of this Court, or the lack of a specific intent to sell obscene matter that would be found obscene by a jury and upon judicial review, would have been immaterial. *Rosen* v. *United States,* 161 U.S. 29 (1896); *Kahm* v. *United States,* 300 F.2d 78, 86 (5th Cir. 1962), *cert. denied* 369 U.S. 859 (1962); *United States* v. *Oakley,* 290 F.2d 517, 519 (6th Cir. 1961), *cert. denied,* 368 U.S. 888 (1961); *Schindler* v. *United States,* 208 F.2d 289 (9th Cir. 1953); *California* v. *Williamson,* 207 Cal. App. 2d 839, 845, 24 Cal. Rptr. 734, 738 (Dist. Ct. of App. 1962); *also see Alexander* v. *United States,* 271 F.2d 140, 145 (8th Cir. 1959); *United States* v. *Hockman,* 277 F.2d 631, 633 (7th Cir. 1960), *cert. denied* 364 U.S. 837 (1960); *People* v.

Finkelstein, 11 N.Y.2d 300 (1962), *cert. denied* 371 U.S. 863 (1962).

In *Rosen* v. *United States, supra,* this Court specifically rejected a similar contention addressed to a federal statute. There the defense requested a trial instruction of acquittal if a reasonable doubt existed that the defendant knew the mailed material to be obscene. In upholding the refusal to charge in this manner the Court declared:

> "The inquiry under the statute is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mails by one who knew or had notice at the time of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. Congress did not intend that the question as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails." 161 U.S. at 41.

In *Ginzburg* v. *United States,* 383 U.S. 463 (1966), the defendant believed that his material was protected by prior Supreme Court rulings; he said so specifically in the advertisements, which this Court accepted at face value. *Id.* at 468, text and n. 9. Ginzburg's belief, while both honest and mistaken, did not prevent his conviction, for he knew precisely the contents of his publications. Guilt cannot be made to depend upon the putative offender's own appraisal of the legal significance of his conduct. Else a man could acquit himself by his own belief in his innocence.

"Rational grounds" for such belief abound. Upholding the constitutionality of a statute penalizing certain acts and at the same time allowing self-serving protestation as a defense is to nullify in practice the premised constitutional power of the state to penalize the acts.

Scales v. *United States*, 367 U.S. 203 (1961) is equally of no assistance to appellant. In *Scales* the government was found to possess a justifiable interest in prohibiting the association of individuals bent on the overthrow of the government; the governmental interest was not transgressed unless it was demonstrated that the individual on trial assumed membership for the proscribed purpose rather than for "the advancement of legitimate aims and policies." If the governmental interests protected by the instant flag statute are sufficient to justify its constitutionality (see Point I, *supra*), then those interests are irretrievably transgressed immediately upon commission of an act objectively contemptuous of the flag, regardless of the actor's motivation—political or commercial. *See United States* v. *O'Brien, supra; Chaplinsky* v. *New Hampshire, supra.* The residue of conduct that would be objectively contemptuous of the flag and yet deserving of protection because the actor intended a result other than contempt is minimal in comparison to the unintended conduct in *Scales.* There, the residue of conduct flowing from membership in an organization—even one whose aims include the overthrow of government—that would be deserving of protection is substantial, absent the member's specific belief in the one proscribed purpose of the organization.

POINT III

The statutory exception that permits certain non-contemptuous uses of the flag if disconnected from advertisements does not deny appellant equal protection.

Finally, Radich claims that the statute denies him equal protection, based on his erroneous reading of an exception contained in the statute:

> "This subdivision shall not apply to any act expressly permitted by the statutes of the United States of America, or by the United States army and navy regulations, nor shall it be construed to apply to a certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, stationery for private use in correspondence, or newspaper or periodical, on any of which shall be printed, painted or placed, said flag, standard, color, shield or ensign disconnected and apart from any advertisement."

Radich apparently argues that this provision of the statute permits persons to use the flag contemptuously on "ornamental pictures" or in a "newspaper, or periodical" and thus denies him equal protection when it forbids him to use the flag contemptuously on ornamental sculpture. However, read in the context of the entire statute, the major portion of which seeks to prohibit the use of the flag in advertisements, it is quite clear that the exception is intended to permit only non-contemptuous use of the flag for certain purposes, when such use is "disconnected and apart from any advertisement." As the trial court stated:

> "the section does not discriminate between pictures generally and sculpture generally. Only 'ornamental' pictures are excepted. The legislature did not intend to say that pictures desecrating the flag would be exempted as a basis for prosecution and that similar sculpture would not be so protected. Any contemptuous use of the flag comes within the purview of the statute, whether two-dimensional or three-dimensional. We find in this statute no arbitrary discriminatory classification" (28a).

There is a ready and rational distinction between contemptuous and non-contemptuous use of the American flag that permits the legislature to except from penal sanctions certain non-contemptuous uses of the flag without denying a person who uses the flag contemptuously the equal protection of the laws. Indeed, in *Halter* v. *Nebraska,* 205 U.S. 34 (1907) this Court was asked to find that the same statutory exception here in question denied Halter equal protection because Halter was condemned for the non-contemptuous use of the flag in the advertisement of merchandise and under the exception similar non-contemptuous use in "a newspaper, periodical, book, pamphlet, etc.," was not penalized. The Court held that even distinctions between various non-contemptuous uses of the flag were not a denial of equal protection:

> "It was for the State of Nebraska to say how far it would go by way of legislation for the protection of the flag against improper use—taking care, in such legislation, not to make undue discrimination against a part of its people. It chose not to forbid the use of the flag for the exceptional purposes specified in the statute, prescribing the fundamental condition that its use for any of those purposes should be 'disconnected

from any advertisement.' All are alike forbidden to use the flag as an advertisement. It is easy to be seen how a representation of the flag may be wholly disconnected from an advertisement and be used upon a newspaper, periodical, book, etc., in such way as not to arouse a feeling of indignation nor offend the sentiments and feelings of those who reverence it. In any event, the classification made by the State cannot be regarded as unreasonable or arbitrary or as bringing the statute under condemnation as denying the equal protection of the laws." *Id.* at 45.

Appellant was convicted of a contemptuous use of the flag; the exception was therefore inapplicable and could not have denied him equal protection.

Conclusion

The judgment of the Court of Appeals of the State of New York should be affirmed.

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January, 1971

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 169

STEPHEN RADICH,

Appellant,

against

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals
of the State of New York.

BRIEF OF ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

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TABLE OF CONTENTS

	PAGE
Statement of Interest of *Amicus Curiae*	1
Questions Presented	2
POINT I—Appellant's conviction for displaying sculpture which cast contempt upon the flag of the United States does not impinge upon the First Amendment right to freedom of speech	2
POINT II—The terms employed in the statute give adequate warning as to the conduct which is proscribed and are not unconstitutionally vague or overbroad	7
POINT III—The distinction between sculpture which casts contempt on the flag and news reporting on such sculpture, does not contravene the equal protection clause of the Fourteenth Amendment	9
Conclusion	11

TABLE OF CASES

Cases:

Adderley v. *Florida*, 385 U. S. 39, 47 (1966)	3, 4
Beauharnais v. *Illinois*, 343 U. S. 250 (1951)	9
Bond v. *Floyd*, 385 U. S. 116, 135 (1968)	5, 6
Cowgill v. *California*, —— U. S. ——, 38 USLW 3262 (Jan. 19, 1970)	4
Cox v. *Louisiana*, 379 U. S. 536 (1965)	3, 4
Dandridge v. *Williams*, 397 U. S. 471, 485 (1970)	10

PAGE

Halter v. *Nebraska*, 205 U. S. 34, 41 (1906) 5, 6, 7

Harper v. *Virginia State Board of Elections*, 383 U. S. 663 (1966) 10

Hodsdon v. *Buckson*, 310 F. Supp. 528, 534 (D. Del. 1970) 7

Hoffman v. *United States*, 256 A. 2d 567, 569 (1969) 4, 8

Knight v. *Board of Regents of the University of the State of New York*, 269 F. Supp. 339 (S.D.N.Y., 1967), aff'd 390 U. S. 36 (1968) 6

Lindsley v. *Natural Carbonic Gas Company*, 220 U. S. 61 (1911) 10

McGowan v. *Maryland*, 366 U. S. 420, 425 (1961) ... 10

New York Times v. *Sullivan*, 376 U. S. 254, 263, 269 (1963) 9

People v. *Burton*, 27 N. Y. 2d 198 (1970) 6

Schacht v. *United States*, 398 U. S. 58 (1970) 5

Street v. *People of New York*, 394 U. S. 576 (1969) 7

Tinker v. *Des Moines Independent Community School District*, 393 U. S. 503 (1969) 6

United States v. *O'Brien*, 391 U. S. 366, 376 (1967) ..2, 3, 4

Walters v. *City of St. Louis*, 347 U. S. 231, 237 (1954) 10

West Virginia State Board of Education v. *Barnett*, 319 U. S. 624 (1943) 6

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BRIEF OF ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

Statement of Interest of *Amicus Curiae*

The instant case involves the constitutionality of § 1425, subd. 16 of the New York Penal Law (now General Business Law § 136[d]), making the defiling and desecration of the American flag a misdemeanor. As the chief legal officer of the State (New York Executive Law § 63), the Attorney General is charged with the defense of State statutes (Executive Law § 71; New York Civil Practice Law and Rules § 1012[b]).

The statute at issue is compatible with the First Amendment guarantee of free speech, makes no invidious distinctions between forms of expression, and employs terminology which is sufficiently clear in describing the punishable conduct.

We agree with and endorse the position taken by the District Attorney of New York County with respect to his defense of the New York statute.

Questions Presented

1. Whether appellant's conviction for displaying sculpture which cast contempt upon the flag of the United States of America deprives him of his First Amendment right to freedom of speech.

2. Whether appellant's conviction for displaying sculpture which cast contempt upon the flag contravenes the Fourteenth Amendment's guarantee of equal protection of the laws.

3. Whether the statute fails to give adequate warning of the proscribed conduct or is overbroad in scope, and, therefore, violates the due process clause of the Fourteenth Amendment.

POINT I

Appellant's conviction for displaying sculpture which cast contempt upon the flag of the United States does not impinge upon the First Amendment right to freedom of speech.

Appellant argues that sculpture is the precise equivalent of speech and that because it seeks to express attitudes or ideas, it must be protected by the First Amendment. However, as this Court said in *United States* v. *O'Brien,* 391

U. S. 366, 376 (1967):

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."

See in accord *Cox* v. *Louisiana*, 379 U. S. 536 (1965) and *Adderley* v. *Florida*, 385 U. S. 39, 47 (1966).

Moreover, the facts of the instant case are an excellent illustration of the fallacies inherent in appellant's argument. The conduct in question* undoubtedly defiled the flag and at the same time completely failed to convey any idea other than this defiling. Counsel suggested at trial (Record on Appeal, p. 91a) that it signified "organized religion . . . supporting . . . aggressive acts." Hilton Kramer, the art news editor of the New York Times, who had reviewed the sculpture, testified that:

> "I felt it was the artist's intention to communicate something, but I personally did not feel politically stimulated by it." (Record, p. 109a)

Even in the context of the anti-war songs being played in the background, the "construction" merely dramatized the sculptor's view rather than expressing it. Obviously, the flag was draped over a phallus for shock effect and precisely because the sensibilities of most viewers would be offended. Utilization of the numerous other avenues for expressing anti-war or anti-religious sentiments would have informed the public of the precise nature of the protest; however, the sculptor chose instead to obscure the

---

* The sculptor's "construction" was described in the opinion of the trial court (Record on Appeal, p. 25a) as "in the form of a large cross with a bishop's mitre on the headpiece, the arms wrapped in ecclesiastical flags and an erect penis wrapped in an American flag protruding from the vertical standard."

message in order to perpetrate a more dramatic and offensive act.

In *Hoffman* v. *United States*, 256 A. 2d 567, 569 (1969), defendant was convicted of violating 18 U.S.C. § 700, a federal statute substantially parallel to New York's § 1425, subd. 16. He wore a shirt which resembled an American flag and which bore a button saying "Vote Pig Yippie in Sixty-Eight." The District of Columbia Court of Appeals in affirming the conviction commented:

> "[Appellant] argues that his conduct was 'symbolic speech' and that no distinction should be made between symbolic and non-symbolic communication of ideas. We disagree. The First Amendment protects freedom of speech and not freedom of conduct."

Similarly, in *Cowgill* v. *California*, —— U. S. ——, 38 USLW 3262 [January 19, 1970], the defendant had cut up an American flag and fashioned it into a vest which was worn on a public street. In concurring in the vote to dismiss Cowgill's appeal from his conviction for flag mutilation, Mr. Justice Harlan (Mr. Justice Brennan concurring) noted that there was no attempt at dissemination of ideas apparent in his conduct from the record on appeal. While appellant in the instant case was found guilty of casting contempt on the flag rather than of mutilation, both involved the transformation of an actual American flag into a different object, for the apparent purpose of demonstrating an attitude rather than conveying a particular meaning. The exact nature of such a protest would have to be explained in words, and once this was done, the transformation of the flag would be merely incidental to the thought conveyed by the words.

Indeed, the picketing and draft card burning reviewed by this Court in *United States* v. *O'Brien, supra; Adderley* v. *Florida, supra;* and *Cox* v. *Louisiana, supra,* could be more

readily characterized as speech than the "construction" displayed by appellant, since they are specifically directed at the object of protest while the sculpture in itself was not. Thus, appellant Radich's difficulties in transforming the conduct at issue into speech are understandable. The flag of the United States is "symbolic of the existence and sovereignty of the Nation." *Halter* v. *Nebraska,* 205 U. S. 34, 41 (1906). However, it is not tied to any particular national policies or national leaders. Thus, statutes seeking to prevent acts which degrade the flag do not promote or demand orthodoxy of thought.

Appellant unsuccessfully attempts to equate this case with *Schacht* v. *United States,* 398 U. S. 58 (1970). In *Schacht,* the federal statute in question made it a crime for any person "without authority" to wear a uniform of the United States Armed Forces, except for an actor in a theatrical production "if the portrayal does not tend to discredit [the] Armed Forces" (10 U.S.C. § 772[f]). It is clear that while the Army is necessarily identified with military efforts, the flag is merely the emblem of our unity as a country. The provision at issue does not mandate or even encourage any particular attitude toward war or peace. It would prohibit sculpture casting contempt upon the flag regardless of whether the contempt was related to an anti-war demonstration or to a protest against governmental refusal to use the atom bomb in Vietnam.

A close analogy may be found in provisions requiring minimal affirmation of support for the United States and New York Constitutions. In *Bond* v. *Floyd,* 385 U. S. 116, 135 (1968), the United States Supreme Court in explicit terms differentiated support for the Constitution from agreement with particular aspects of national policy:

> ". . . [W]hile the State has an interest in requiring its legislators to swear to a belief in constitutional processes of government, surely the oath gives it no

interest in limiting its legislators' capacity to discuss their views of local or national policy."

See in accord *Knight* v. *Board of Regents of the University of the State of New York,* 269 F. Supp. 339 (S.D.N.Y. 1967), aff'd 390 U. S. 36 (1968). The constitutional oath of office does not suppress the right of legislators to express political views or to inquire into and criticize State or national policy.

Appellant herein contends that the statute at bar compels respect for the flag. However, unlike *West Virginia State Board of Education* v. *Barnett,* 319 U. S. 624 (1943), New York's provision does not demand any expression of respect, nor even the minimal affirmation approved in such cases as *Bond* and *Knight.* It merely requires refraining from an *act* of desecration or contempt. See *People* v. *Burton,* 27 N. Y. 2d 198 (1970).

Nor is the case of *Tinker* v. *Des Moines Independent Community School District,* 393 U. S. 503 (1969), in any way analogous. There, school authorities attempted to prevent students from wearing black armbands. The concept of casting contempt was not involved and no governmental interest in preventing the wearing of the armband was demonstrated.

The decision below, relying upon this Court's rationale in *Halter* v. *Nebraska, supra,* cited the statutory purpose of preventing a breach of the peace* and pointed out:

"Whether defendant thinks so or not, a reasonable man would consider the wrapping of a phallic symbol with the flag an act of dishonor . . ."

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* The recent decision in *Long Island Vietnam Moratorium Committee* v. *Cahn,* —— F. 2d —— (2nd Cir. 1970) (appeal to be filed), which held invalid the statutory section prohibiting the placing of a mark on the flag, specifically distinguished the case at bar because of the difference in legislative intent underlying the two provisions.

Another lesson can be learned from *Halter* as well. If a state may legitimately prevent the national symbol from being used for commercial profit by purveyors of beer, it is clear that there is a special public interest in the flag. Statutes prescribe how the flag may be displayed, how it may be lawfully disposed of and for what purposes it may be used. See 4 U.S.C. § 3; 36 U.S.C. §§ 172 through 177. Cf. *Hodsdon* v. *Buckson*, 310 F. Supp. 528, 534 (D. Del. 1970).

This Court's decision in *Street* v. *People of New York*, 394 U. S. 576 (1969), demonstrates that acts involving the flag cannot be equivalent to words spoken about the flag. This distinction is clear from the fact that this Court remanded in *Street* so that the interlacing elements could be separated by the State courts. As to appellant herein, the conviction rests solely upon the fact that an American flag was fashioned into a construction which degraded it.

POINT II

The terms employed in the statute give adequate warning as to the conduct which is proscribed and are not unconstitutionally vague or overbroad.

In attempting to show that § 1425, subd. 16 of the New York Penal Law is unconstitutionally vague and therefore void, appellant quotes general language from cases which hold that a criminal statute must be sufficiently explicit to inform those who are subject to it of the nature of the conduct prohibited. However the language of New York's provision has the requisite clarity and specificity. Indeed, appellant was unable to find any decision which struck down the words "cast contempt upon" as being overly vague, either in the context of desecration of the flag or in any other context.

A case in point is *Hoffman* v. *United States, supra,* which sustained the constitutionality of 18 U.S.C. § 700.*

The Court held (256 A. 2d at 569-570):

> "A statute violates due process of law if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits; but a statute is not required to be drawn with the precision of a chemical formula or a mathematical equation. Only a reasonable degree of certainty is required in order that fair notice is given to those of ordinary intelligence. We hold that the Statute meets this test and we reject the claim that the Statute is unconstitutionally vague."
>
> * * *
>
> "The flag desecration Statute enumerates several forms of mistreating or abusing the flag which, by the very nature of the conduct, the offender is presumed to have intended to cast contempt upon the flag. The terms used in the Statute to describe the proscribed conduct; i.e. mutilating, defacing, defiling, burning or trampling, have clearly defined meanings in their ordinary usage, and each word connotes an objective act of desecration of the flag. In the present case the information charges appellant with mutilating, defacing and defiling the flag. The term 'defile' encompasses conduct which dishonors the flag as well as the generally more accepted use of making something filthy or dirty."

---

* "(a) Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning or trampling upon it shall be fined not more than $1,000 or imprisoned for not more than one year or both."

* * *

"[Flag of the United States includes any representation of the flag] by which the average person seeing the same without deliberation may believe the same to represent the flag."

The sculpture exhibited by appellant herein can be aptly described as defiling the flag under the criteria of the Court of Appeals quoted above.

Appellant states without elaboration that the use of the word "contempt" in the flag statute "involves an entirely different concept" from that of contempt of court (Br., p. 8). It is true that the underlying governmental interests are somewhat different in the two situations. However, in both, a course of conduct which is defined as contumacious is subject to penal sanction. In both, the definition of the word "contempt" is crucial to a finding that the offense has been committed. This refutes appellant's argument (p. 8) that the mere fact that he may be communicating an attitude is sufficient to insulate him from the statute's reach, and to render the statute constitutionally infirm. Terminology such as "casts contempt upon" has also been utilized and understood in numerous jurisdictions in the context of civil and criminal libel laws. Cf. *Beauharnais* v. *Illinois*, 343 U. S. 250 (1951); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 263, 269 (1963).

The fact that this terminology has sufficient specificity also answers appellant's claims of overbreadth. The statute includes in its ambit solely conduct which defiles the flag; in view of the valid state interest in preventing such conduct, and the other avenues of expression for political attitudes, there is no resulting incursion on First Amendment rights.

POINT III

The distinction between sculpture which casts contempt on the flag and news reporting on such sculpture, does not contravene the equal protection clause of the Fourteenth Amendment.

Appellant informs us (p. 27) that the equal protection clause of the Fourteenth Amendment forbids a state from

arbitrarily discriminating between different classes of persons, citing *Harper* v. *Virginia State Board of Elections*, 383 U. S. 663 (1966). Building on this generality, appellant asserts that since the sculpture at issue was depicted in a news story in Life Magazine without any resulting prosecution, his conviction for displaying the sculpture results in a denial of equal protection.

However, appellant appears to have forgotten that the crux of the misdemeanor punishable by the New York statute is that of casting contempt upon the flag. While the exhibition offers the sculpture to the public on the ground that it has some inherent value or merit, a news report or photograph of the sculpture makes no such representation. News coverage, in the absence of editorial comment, merely informs the public that the exhibition has taken place.

It should also be noted that an onlooker might well be incited or provoked towards unlawful acts by seeing the actual flag defiled in a public place; however newspaper or magazine reference to such defilement is one step removed from the original object and would be unlikely to have such an effect.

Thus, the distinction is a rational one, in harmony with the standards created by this Court. *Dandridge* v. *Williams*, 397 U. S. 471, 485 (1970); *Walters* v. *City of St. Louis*, 347 U. S. 231, 237 (1954); *McGowan* v. *Maryland*, 366 U. S. 420, 425 (1961); *Lindsley* v. *Natural Carbonic Gas Company*, 220 U. S. 61 (1911).

CONCLUSION

The judgment below should be affirmed.

Dated: New York, January 4, 1971.

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IN THE

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STEPHEN RADICH,

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—v.—

PEOPLE OF THE STATE OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

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INDEX

PAGE

POINT I

Appellee's contention that the sculpture exhibited by appellant is not entitled to First Amendment protection 1

POINT II

Appellee's contention that the flag statute is not void for vagueness or overbreadth 12

POINT III

Appellee's contention that the statute does not deny appellant equal protection because it permits only non-contemptuous use of the flag when disconnected from advertisements 20

POINT IV

Appellant has been prosecuted and convicted for the communication of ideas, and such a conviction cannot stand under the First Amendment 23

CONCLUSION 24

APPENDIX I—A Brief Compendium of the Use of the American Flag by Contemporary Artists 1a

APPENDIX II—A Brief Survey of the Use of the American Flag as an Aid in the Dissemination of Political Ideas 24a

APPENDIX III—Examples of the Commercial Use of the American Flag 38a

Table of Authorities

PAGE

Cases:

Aptheker v. Secy. of State, 378 U.S. 500 (1964) 15

Baggett v. Bullitt, 377 U.S. 360 (1964) 14

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) .. 9
Cox v. Louisiana, 379 U.S. 536 (1965) 10
Crosson v. Silver, —— F. Supp. ——, No. —— Civil 70-79, Tucson (D. Arizona, Nov. 13, 1970) 12, 13, 14, 16

Hodsdon v. Buckson, 310 F. Supp. 528 (D. Del. 1970) 20

Jacobellis v. Ohio, 378 U.S. 184 (1964) 3
Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) .. 2, 3

Kunz v. New York, 340 U.S. 290 (1951) 15

Long Island Vietnam Moratorium Committee v. Cahn, —— F.2d —— (2d Cir., Slip Opn. 328 (12/24/70)) ..6, 12, 21, 23

Memoirs v. Massachusetts, 383 U.S. 413 (1966) 3, 5

New York Times v. Sullivan, 376 U.S. 254 (1964) 3
Niemotko v. Maryland, 340 U.S. 268 (1951) 16

People v. Bookcase, Inc., 14 N.Y.2d 409 (1964) 14

Schacht v. United States, 398 U.S. 58 (1970) 7, 10
Smith v. California, 361 U.S. 147 (1959) 3
State v. Schlueter, 127 N.J.L. 496, 23 A.2d 249 (N.J. 1941) 16, 17

PAGE

State of Washington v. Floyd Wayne Turner, Jr., No. 40096, Opinion by Hale, J. filed Sept. 3, 1970 .....11, 17
Street v. New York, 394 U.S. 576 (1969) 5, 6, 7, 8, 23

Terminiello v. Chicago, 337 U.S. 1 (1949) 15
Thornhill v. Alabama, 310 U.S. 88 (1940) 16
Time, Inc. v. Hill, 385 U.S. 374 (1967) 3
Tinker v. Des Moines, 393 U.S. 503 (1969) 5

United States v. O'Brien, 391 U.S. 367 (1968) 4-5, 7

Constitutional Provision:

United States Constitution
First Amendment 1, 2, 3, 4, 5, 6, 8, 9, 10, 19, 23

State Statutes:

Penal Law, Arizona Revised Statutes (1956), Section 41-793 (C) 12

Penal Law, New York, Section 1425, subd. 16 (now Gen. Bus. Law, Section 136) 6, 12, 21

Penal Law, Washington Laws of 1919, ch. 107, p. 259, RCW 9.86 17

Other Authorities:

Associated Press Dispatch, Corning, New York, January 31, 1970 15

The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970) 20

PAGE

Frazer, *The Golden Bough* (MacMillan & Co., Ltd., 1963), Chapters XIX-XXIII 23

Freud, *Totem and Taboo* (W. W. Norton & Co., 1950) 23

The Governor Lectures on Art, The New York Times Magazine (Apr. 1907), 28 11

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Meikeljohn, *The First Amendment Is an Absolute*, 1961 Sup. Ct. Rev. 245 11

Rochester Democrat and Chronicle, March 15, 1970, 3B 15

Schenectady Gazette, June 6, 1970, 27 15

Steiner, *Taboo* (Penguin Book, 1967) 23

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REPLY BRIEF FOR APPELLANT

POINT I

Appellee's contention that the sculpture exhibited by appellant is not entitled to First Amendment protection.

Appellee contends that the First Amendment does not prohibit the conviction of appellant for exhibiting sculpture because the exhibition is "non-verbal," and therefore not speech but conduct, and, as conduct, is insufficiently communicative to be constitutionally protected.

Because the First Amendment refers to speech, appellee believes that sculpture—non-verbal art—may be censored.

The State thus ignores *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952) in which this Court explicitly rejected the notion that the protection of the First Amendment was limited to verbal communication. In ruling that motion pictures were entitled to First Amendment protection, Mr. Justice Clark stated:

> "... the present case is the first to present squarely to us the question whether motion pictures are within the ambit of protection which the First Amendment ... secures to any form of 'speech' or 'the press.'
>
> "It cannot be doubted that motion pictures are a significant medium for the communication of ideas.
>
> * * * * *
>
> "... we conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments...." 343 U.S. at 501-502.

Paraphrasing Mr. Justice Clark, it can hardly be doubted that painting and sculpture are significant media for the communication of ideas. Accordingly, they are squarely within the ambit of First Amendment protection and appellant's use of the flag in connection with his sculpture was an absolutely protected form of expression.

Appellee nonetheless contends that non-verbal art is within the First Amendment's orbit only if it has a sufficient communicative aspect. The exhibition of sculpture in issue here, the State argues, has only a minimal communicative element, first, because appellant's motive was commercial. Appellant testified that he displayed the sculp-

tures because they were works of art and because they were for sale (Appellee's Brief, p. 22). But commercial motivation is no justification for narrowing the protection of expression secured by the First Amendment. *New York Times* v. *Sullivan*, 376 U.S. 254, 265-266 (1964); *Smith* v. *California*, 361 U.S. 147, 150 (1959). Books, magazines, photographs and motion pictures are customarily for sale or rent or are in some way a source of income for those who produce or exhibit them. They do not for that reason lose First Amendment protection. *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *Joseph Burstyn, Inc.* v. *Wilson, supra*, at 501; *Jacobellis* v. *Ohio*, 378 U.S. 184 (1964).

The second basis for appellee's claim that the sculpture is not sufficiently communicative results from a misreading of the testimony of appellant's expert witness, the Art News Editor of the New York Times. The witness did not say that he saw no discernible political or social comment in the work (Appellee's Brief, p. 23); he testified that the work was protest art; that he was aware that the artist intended to communicate a political anti-war message but that his own interest in the exhibition was primarily esthetic (A. 110a, 106a, 109a). There has never been any question in this case about the communicative nature of these sculptures, either in the trial court (A. 26a, 30a) or in the Court of Appeals (A. 9a, 16a).

But entirely apart from whether it communicates a political message, art work with esthetic value is protected by the First Amendment. Cf. *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966); *Burstyn, Inc.* v. *Wilson, supra*. The political message projected by the work as protest art in itself warrants First Amendment protection. Moreover, even without a political message, a work of art utilizing a flag

motif would be entitled to First Amendment protection (see Nos. 13a, 15a in Appendix to this Reply Brief).

Appellee concedes that a political message is entitled to constitutional protection by proposing that this Court judge the sculpture by what it labels an "objective test" of the sufficiency of its communicative or expressive aspect. Under the test proposed, the First Amendment would only be applicable to "conduct," if a reasonable man, reasonably well informed, would understand the meaning intended. First Amendment protection would therefore depend on the success of the artist in projecting his message to the "reasonably informed man"; it would exclude messages meant only for a few. Not every reasonable man understands James Joyce or T. S. Eliot.[1]

The reasonable man would, according to defendant, understand the anti-war message of draft card burning better than that of the sculpture in issue here. He might also understand the meaning of destroying Selective Service records or bombing the Pentagon better than he would understand the paintings of Picasso.

Recognizing the communicative aspect of symbolic conduct is not, of course, the problem that this Court has faced in applying the First Amendment to symbolic conduct. The problem is whether or not regulation of the conduct is justified by a governmental interest unrelated to the suppression of free speech. *United States* v. *O'Brien,*

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[1] If such were the test what rational basis would there be for not applying the same test to the spoken word, so that only the more articulate speaker who can be understood by reasonable men, reasonably well informed, would be entitled to First Amendment protection?

391 U.S. 367 (1968). Appellee's proposed "objective test" ignores this.

We do not believe that this Court has ever withheld First Amendment protection from a work of art on the ground that its creation involved conduct which the government could regulate. Obscene writings, pictures and objects are outside First Amendment protection because they are found to utterly lack redeeming social value. Such a finding is, in effect, a finding that they are not art works. Cf. *Memoirs* v. *Massachusetts, supra.*

This is not a prosecution for obscenity, as the trial court recognized (A. 94a). It was not charged, or found, that the art work appealed to prurient interest. If the work had been prosecuted under an obscenity statute, a conviction would be invalid because all three criteria established by this Court for obscenity convictions are lacking.[2]

As we have stated in our main brief, we believe that art works are speech, and accordingly, *Street* v. *New York,* 394 U.S. 576 (1969) requires that appellant's conviction be overruled. The four governmental interests which might conceivably have been furthered by punishing Street were examined in the Court's opinion in that case. Those interests are relevant also where symbolic conduct rather than pure speech is involved (*United States* v. *O'Brien, supra;* See *Tinker* v. *Des Moines,* 393 U.S. 503 (1969)).

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[2] "[T]hree elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." *Memoirs* v. *Massachusetts, supra,* at 418.

In *Long Island Vietnam Moratorium Committee* v. *Cahn*, —— F.2d —— (2d Cir., Slip Opn. 328 (12/24/70)) the Court of Appeals considered another subdivision of New York's flag statute, § 136(a) of the General Business Law (formerly Penal Law 1425, subdivision 16 (a)). This case involved the imposition of a peace symbol on what was claimed to be a representation of the flag. The unanimous opinion of that court by Lumbard, Ch. J. found that statute unconstitutional both on its face and as applied in that case because (1) traditional First Amendment activity might be swept within its ambit, (2) plaintiffs were using the flag as a means of expressing their views on a political issue, (3) the statute failed to provide enforcement officials with adequate guidance concerning what is proscribed and (4) it failed to afford adequate notice to the public of the scope of its proscription.

The Court described the question before it to be "whether non-verbal or visual communication involving the flag and flag alteration" is granted similar protection to the verbal communication at issue in *Street* v. *New York, supra.* To answer the question it applied the four governmental interests outlined in *Street* and found that none of them justified the prohibition of various political uses of the flag.[3]

Although appellee does argue that the flag desecration statute serves the second interest, an interest in preventing a breach of the peace, it relies largely on the fourth govern-

[3] Subdivision (d) of the statute was not before the court, but the opinion erroneously distinguishes between subdivisions (a) and (d) with respect to the first possible state interest: incitement of others to unlawful acts, citing only the decision of the New York Court of Appeals appealed from herein. The New York Court of Appeals did not rely on the first interest but on the second, and it made no distinction between the purpose of the subdivisions of the statute.

mental interest: assuring proper respect for our national emblem. Appellee's brief states again and again that the flag desecration statute serves to protect the integrity of the flag as a symbol of national unity (pp. 19, 23, 27, 31, 34). Appellant also believes that this is the interest served by the statute. However, we believe that this Court's ruling in *Street* v. *New York, supra,* at 593, that an interest in assuring respect for the flag has no place in a free society is equally applicable here. That interest is not unrelated to the suppression of free expression. See *United States* v. *O'Brien, supra,* at 377.

Appellee claims that such interest is unrelated to the suppression of free expression because the statute is neutral on political matters, banning the use of the flag by hawks as well as doves. This begs the point: the statute leaves Americans free to use the flag to praise the government's war policies, but prohibits them from using the flag to oppose those policies no matter what the grounds for their opposition—the pacifists' objection to the war itself, or the hawks' objection to the limitations of the war. Cf. *Schacht* v. *United States,* 398 U.S. 58 (1970).

Appellee seeks to distinguish the *Schacht* case on the ground that there is no valid governmental interest in protecting the military services from discredit. Assuming *arguendo* that there is less interest in protecting the military from discredit, the State's argument that the conviction of appellant can be sustained on the basis of the third interest referred to in *Street,* the interest in protecting the sensibilities of passers-by from shock and offense, would apply equally if the statute protected the military's symbols from contempt: a passerby to whom the flag "had special significance because of the loss of a relative in the Armed

Forces" (Appellee's Brief, p. 27) might well be more offended by seeing an anti-war street play in which an actor wore a military uniform, than by seeing the flag sculpture in appellant's second story gallery window.

Even if there may be circumstances where First Amendment protection could be denied because expression is forced upon a captive audience, this is not that case, and the statute is not narrowly drawn to encompass only such circumstances. There was no testimony that anyone other than the arresting officer saw the second story window of appellant's gallery, or would have seen it while passing by unless they stopped to look up.[4] The effigy in the window was not a separate basis for appellant's conviction at trial, and the trial court made no finding that the window display was more difficult to avoid than a sidewalk speaker. Nor did the Court of Appeals so suggest.

We submit that this Court may take judicial notice of the fact that a second story window display on New York City's Madison Avenue is not so obtrusive to those making their way through traffic on the street as to force them to change direction to avoid seeing it; if anyone did glance up, all he needed to do to avoid an image which was offensive to him would have been to redirect his eyes to the street level shops. This effort would be far less than what appellee states would be necessary to avoid the sidewalk speaker—"crossing the street or walking in a wide arc around the soapbox." (See Appellee's Brief, p. 27.) On the other hand, a finding that the sculpture in the window assaulted a "cap-

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[4] In *Street*, the evidence at trial showed that there were some thirty persons on the corner near the flag and five to ten on the corner with appellant (394 U.S. at 578).

tive audience," would have to be based on evidence, and here there was none.

It is important to note that the question of assault on a captive audience was not raised by the State at the trial or on the prior appeals. The State offered no evidence of assault, nor did it argue on the trial or at any time until now that there was one. The case was tried by the State without any suggestion that the noose sculpture visible in the gallery window might be subject to condemnation for any different reason than the other sculptures; the trial court did not so find, nor did the Court of Appeals.

Moreover, an artistic work which offends passers-by, whether it be sculpture or drama, does not constitute "insulting or fighting words," condemned in *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942). Under the statute in *Chaplinsky,* epithets directed *at an individual* were prohibited. Such epithets are outside the protection of the First Amendment on the grounds that they are without social value, much as obscenity is outside that protection because it is utterly without redeeming social value. As has been stated above, this is not an obscenity prosecution; appellant was not charged with obscenity and could not have been charged with obscenity.

Finally, appellee attempts to justify appellant's conviction by relying upon its interest in suppressing highly controversial expressions of opinion which might provoke a hostile reaction, thereby endangering the public peace. However, the State's expectation that a breach of the peace may be reasonably expected to flow from casting contempt on the flag is negated by the fact that no evidence of a breach of the peace has been adduced in con-

nection with any of the numerous prosecutions which have arisen under the statute. Conduct protected by the First Amendment cannot be prohibited as "inherently dangerous" because of fear of a potentially hostile audience.[5] *Cox* v. *Louisiana,* 379 U.S. 536, 550 (1965).

Appellee appears to believe that one element of an art work may be isolated from the work as a whole as a subject for censorship. As alternative materials and symbols are available to artists, the State believes that it may require them to eschew those which they have chosen. However, no distinction can be made in an art form between the message and the medium. In the Morrel sculptures, as in most art works, the mode of idea transmission is inextricably intertwined with the idea itself. As Judge Fuld noted in his dissent below:

> "In our modern age, the medium is very often the message, and the State may not legitimately punish that which would be constitutionally protected if spoken or drawn simply because the idea has been expressed instead, through the medium of sculpture." 26 N.Y.2d at 127-128 (A. 20a).

Accordingly, in the *Schacht* case, the actor was not told that he could not wear a military uniform because he had an alternate way of making his anti-war point.

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[5] Contemporary music could be banned under the theories advanced by the State of New York in its brief. Musical performances have caused riots: the first performance of Stravinsky's Rites of Spring caused a riot in the audience on account of the "uncompromising harshness and violence of its entirely novel idiom." Groves Dictionary of Music & Musicians, St. Martins Press, 5th Edition, Vol. VIII p. 138.

We believe that a free society cannot afford to censor art on the ground that it is disturbing or offensive. Art can never threaten the strength of democracy.[6] Novels, dramas, paintings, sculpture and poems are essential to education for self-government.[7]

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[6] See *The Governor Lectures on Art*, The New York Times Magazine (Apr. 1967), p. 28, where Nelson A. Rockefeller describes a meeting he and others had with Henry Luce, late publisher of Time, Life and Fortune magazines, who had expressed concern that modern art was threatening the strength of democracy. Rockefeller reports:

> "The fascinating thing about this experience is that we ended up the evening with Harry being convinced that modern forms of artistic expression were the only area left in democracy where there was true freedom, where you had absolute freedom and there were no holds barred. He went from a deep concern that modern art was a destructive force, to the conclusion it was one of the great areas of freedom, one of the bastions of freedom and strength in our lives" (p. 124).

The history of flag desecration in Germany is set out in the Appendix to *Washington* v. *Turner*, Supreme Court of Washington, September 3, 1970. (Reproduced in Appellant's Supplemental Appendix at Supp. App. pp. 27a-39a.)

[7] "In my view, 'the people need free speech' because they have decided, in adopting, maintaining and interpreting their Constitution, to govern themselves rather than to be governed by others. And, in order to make that self-government a reality rather than an illusion, in order that it may become as wise and efficient as its responsibilities require, the judgment-making of the people must be self-educated in the ways of freedom. That is, I think, the positive purpose to which the negative words of the First Amendment gave a constitutional expression. Moreover, . . . I believe, as a teacher, that the people do need novels and dramas and paintings and poems 'because they will be called upon to vote.' The primary social fact which blocks and hinders the success of our experiment in self-government is that our citizens are not educated for self-government. We are terrified by ideas, rather than challenged and stimulated by them. Our dominant mood is not the courage of people who dare to think. It is the timidity of those who fear and hate whenever conventions are questioned." Meikeljohn, *The First Amendment Is an Absolute*, 1961 Sup. Ct. Rev. 245, 266.

POINT II

Appellee's contention that the flag statute is not void for vagueness or overbreadth.

Appellee argues that the phrase "publicly . . . cast contempt upon" the American flag is not vague, that reasonable men know what it means, and that there is nothing vague about the statutory definition of a flag. But the very cases cited by appellee in the footnote on page 42 and elsewhere in its brief indicate that reasonable men—state prosecutors and judges of the Federal courts—find "casting contempt" vague and overbroad and also disagree as to what is within the definition of flag in the statute.

Thus in *Long Island Vietnam Moratorium Comm.* v. *Cahn*, —— F.2d —— (2d Cir., Slip. Opn. 328, Dec. 24, 1970) the Court of Appeals for the Second Circuit found another subdivision of New York's flag statute, section 136(a) New York General Business Law (formerly subparagraph a of subdivision 16 of section 1425 of the Penal Law) unconstitutional. In that case two members of the three-judge court below had ruled that the representation which was the basis of the threatened prosecution was not a flag as defined in the statute and so did not reach the constitutional issue. Yet the three members of the Circuit Court held that it was within the statutory definition of "flag" and proceeded to the constitutional question.

In *Crosson* v. *Silver*, —— F. Supp. ——, No. —— Civil 70-79, Tucson (D. Arizona, Nov. 13, 1970) a three-judge court considered the constitutionality of Arizona's flag desecration statute (A.R.S. § 41-793(C). 1956) which is substantially the same as New York's and includes an almost

identical definition of flag. The court was asked to enjoin a prosecution for flag burning, with intent to cast contempt upon the flag, at a public meeting where the flag and the foreign policy of the United States were attacked.

Speaking of the provision against any "act [which] casts contempt" in that statute, the three-judge court held that such a prohibition was not limited to "acts the doing of which the legislature may validly prohibit." "Contempt," it said, would describe acts such as sticking out one's tongue, turning one's thumbs downward, or raising a clenched fist salute.

Ruling that the statute is unconstitutional, the *Crosson* court said:

> "The 'contempt' portion of § 41-793 (C) would prohibit the doing of all such acts. Yet these acts, which are clearly symbolic speech, do not affect the only legitimate state interest underlying such a prohibition. Even assuming there are acts of contempt which, when directed toward the flag, are inherently inflammatory, the prohibition against 'acts [which] cast contempt' by its terms proscribes substantially more than is necessary to protect the state's interest; and that which is unnecessarily proscribed includes protected symbolic speech. Since we cannot see that any limiting construction short of excision can cure the defect,[5] this portion of § 41-793 (C) must be struck down as unconstitutionally overbroad. *Thornhill* v. *Alabama,* 310 U.S. 88 (1940)."

"[5] See *Harrison* v. *NAACP,* 360 U.S. 167 (1959). It will not suffice that the state may decline to prosecute relatively trivial acts of contempt. The hazard of prosecution and consequent chilling effect remains. *Baggett* v. *Bullitt,* 377 U.S. 360, 373 (1964)."

Rejecting the possibility of saving that part of the statute which referred to the physical acts of mutilation, etc., the Court in *Crosson* said:

> "It may be argued that the statute is disjunctive and thus severable, and that we should approve the 'mutilate, deface, defile, or trample upon' portion. However, we find that these terms, when juxtaposed against the definition of 'flag' in § 71-793 (D), lose whatever susceptibility to a properly narrow application they may have had standing alone."

Appellee describes appellant's claim that the definition of an American flag in the statute is vague, as frivolous because "appellant was convicted for contemptuous use of an actual flag" (p. 43, Appellee's Brief). That argument is irrelevant. As was said in *People* v. *Bookcase, Inc.*, 14 N.Y.2d 409, 418 (1964) " . . . the constitutionality of a statute governing publications is to be tested by what can be done under it and not by the particular violation which is charged with having occurred."

Mr. Justice White, responding to a similar argument in *Baggett* v. *Bullitt*, 377 U.S. 360 (1964) stated:

> "The State labels as wholly fanciful the suggested possible coverage of [the statute] . . . It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful . . . prosecution for some of the activities seemingly embraced within the sweeping statutory definitions. The hazard of being prosecuted . . . nevertheless remains . . . . Well intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law." 377 U.S. at 373.[8]

[8] Unfortunately, many overbroad applications of New York's flag statute have not ended as happily as appellee would have this

Moreover, the argument that an "actual" flag was used is also not factually accurate. The police officer who was the State's sole witness was able to testify only that: "These appear to be flags of the United States Government" (A. 47a). There was no testimony that "actual" flags were used. The word "flag" has been used generally in this case as it is defined in the statute. However, Chief Judge Fuld in his dissent (A. 18a) was careful to refer to the constructions "by an artist named Marc Morrel, in which the latter made use of American flags—or what appeared to be parts of such flags." (26 N.Y.2d at 125.)

Appellee argues that appellant may not claim unconstitutional overbreadth because his conduct would be prohibited under any construction of the statute. Assuming *arguendo* that appellant's exhibition could be barred under a narrowly drawn statute, a statute which is overbroad is unconstitutional on its face and is therefore invalid for all purposes. Thus, this Court has reversed convictions under statutes found to be overbroad in cases where the conduct in issue could have been regulated under a narrowly drawn statute. *Kunz* v. *New York,* 340 U.S. 290 (1951); *Terminiello* v. *Chicago,* 337 U.S. 1 (1949); *Aptheker* v. *Secy. of State,* 378 U.S. 500 (1964).

Court believe. See Appellee's Brief, footnote to page 42. Six Hobart College students were successfully prosecuted for washing the flag in public. *Rochester Democrat and Chronicle,* March 15, 1970, p. 3B. Leonard A. Goodell, who lived in a "hippy house" in Duanesburg, New York, served 10 days in jail for flag desecration when State Troopers arrested him for replacing the stars on his homemade flag with a peace symbol. *Schenectady Gazette,* June 6, 1970, p. 27. Allen Smith was not as fortunate as Fred Pregaskis and was convicted of driving a car contemptuous of the flag because it was painted red, white and blue. *Associated Press Dispatch,* Corning, New York, January 31, 1970.

In *Thornhill* v. *Alabama,* 310 U.S. 88 (1940), Mr. Justice Murphy, speaking for the Court, rejected the argument that an overbroad statute may not be challenged in such a case:

> "An accused, after arrest and conviction under such a statute, does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him." (310 U.S. at 98.)

And in his concurring opinion in *Niemotko* v. *Maryland,* 340 U.S. 268, 273 (1951), Mr. Justice Frankfurter discussed a claim of unconstitutionality for vagueness by an allegedly "hard core" offender:

> "The vice to be guarded against is arbitrary action by officials. The fact that in a particular instance an action appears not arbitrary does not save the validity of the authority under which the action is taken." 340 U.S. at 285.

See also, *Crosson* v. *Silver, supra.*

Appellee also argues that there is no overbreadth in the New York Court of Appeals holding that the statute requires no finding of intent, despite the basic rule, as pointed out by Chief Judge Fuld in his dissent, that *malum prohibitum* cannot be invoked in a "case where the challenged conduct involves the expression of political views" (A. 21a-22a); 26 N.Y.2d at 128. Appellee cites as an authority for its view *State* v. *Schlueter,* 127 N.J.L. 496, 23 A.2d 249 (N.J. 1941), but it fails to mention that the trial court in *Schlueter* had specifically charged the jury that it could

convict only if the defendant committed the offense charged "with evil intent" (23 A.2d at 251).

To the same effect is *State of Washington* v. *Floyd Wayne Turner, Jr.*, decided by the Supreme Court of that state en banc (No. 40096, Opinion by Hale, J. filed Sept. 3, 1970). That case was a prosecution for participation in a flag burning, where the trial court had charged the jury that it need not find that the defendant intended to violate the law. The prosecution was brought under the Uniform Flag Law (Washington Laws of 1919, ch. 107, p. 259, RCW 9.86), which is almost identical to the statute under which Radich has been convicted. The Washington Supreme Court reversed the conviction on the ground that the charge was in error. It said that the conduct covered by Washington's flag desecration statute was not *malum prohibitum* but *malum per se;* that "to defile or hold up to contempt" is conduct involving moral turpitude, and to sustain a conviction, intent must be shown. The court therefore avoided any constitutional question.

Appellee's Brief (p. 46) also suggests that it is not clear that the New York Court of Appeals was ever properly presented with "a question of overbreadth as to the conduct covered" and (p. 16) that appellant is complaining "for the first time in this Court, that the statute might be applied to persons other than himself, whose conduct, such as unorthodox gestures toward the flag, may be constitutionally protected." The facts are otherwise.

On the motion to dismiss at the close of People's case, counsel for appellant said:

> ". . . We say, furthermore, this section, subdivision 16 of 1425 is unconstitutionally vague, and it is, your

Honors, it is a fantastic statute for vagueness. For example, the statute prohibits the defacing, contempt by word or act. This is language which describes attitudes which could be communicated by any kind of conduct, any kind of gesture. For example, thumbing one's nose, would this be contempt, something that is forbidden? Similarly, what is a flag? In here it's defined in the broadest possible terms . . . ." (A. 61a).

And at A. 66a appellant's counsel argued that the constitutionality of the statute "should be tested by what can be done under it and not by the particular violation which is charged with having occurred."

The same argument was made at page 25 of Appellant's Brief to the Court of Appeals, and it was amplified at great length at pages 26-29 of appellant's brief to the Court of Appeals.[9]

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[9] Pages 26-29 of Appellant's Court of Appeals brief read:

"Statutes must provide standards for enforcement; they may not be worded so broadly as to enable public officials to determine which activities will be permitted and which prohibited by selective enforcement. *Giacco* v. *State of Pennsylvania*, 382 U.S. 399; *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87; *Cox* v. *State of Louisiana*, 379 U.S. 536.

"In *Cox*, the purpose of one of the statutes involved was clearly valid: it prohibited the obstruction of public passages. But neither the statute, nor any administrative regulations provided standards for its application. The unbridled discretion thus given enforcement officials endangered the right of persons to equal protection of the laws. And because the conduct controlled by the statute was used to communicate ideas, the unfettered discretion of the authorities allowed them 'to determine which expressions of view will be permitted, and which will not. This thus sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor.' *Cox* v. *Louisiana*, 379 U.S. at 558.

"In the *Giacco* case, a Pennsylvania statute authorized juries to assess costs against acquitted defendants. There were no stand-

Furthermore, there was a separate point made in appellant's Court of Appeals brief that intent was a necessary element for a conviction in all cases involving the First Amendment, and that no intent was established; that, indeed, the appellant had no intent to be contemptuous of the flag (A. 82a) and that he believed the artist was not

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ards in the statute but the State contended that court interpretations required that defendant's conduct be ' "reprehensible in some respect" "improper", outrageous to "morality and injustice" * * * ' before costs could be assessed. The Supreme Court held the act constitutionally invalid, as written and as interpreted, because of the absence of sufficient standards to guide the jury.

"The language of subdivision 16 of Section 1425 of the Penal Code is as subjective and imprecise as the standards of the Pennsylvania courts and permits similar uneven enforcement of the statute.

"It is submitted that subdivision 16 of Section 1425 of the Penal Law gives the same uncontrolled discretion to the authorities as to the *Louisiana* and *Pennsylvania* statutes. Moreover, its broad scope covers activities that are constitutionally protected free speech. *Stromberg* v. *California*, 283 U.S. 359.

"The *Stromberg* case held that a statute, vague and indefinite on its face, cannot be employed to abridge free speech guarantees of the Constitution. For the reasons stated in *Stromberg*, ambiguity or vagueness has not been tolerated in statutes regulating publications and motion pictures. *Kingsley International Pictures Corp.* v. *Regents*, 360 U.S. 684; *People* v. *Bookcase, Inc.*, 14 N.Y.2d 409.

"In *People* v. *Bookcase, Inc., supra*, this Court invalidated Section 484-h of the Penal Law on the ground that the words 'exploits, is devoted to, or is principally made up of descriptions of illicit sex or sexual immorality' were unconstitutionally vague. The Court said: '. . . the constitutionality of a statute governing publications is to be tested by what can be done under it and not by the particular violation which is charged with having occurred' (14 N.Y.2d at p. 418).

"It is submitted that the words of subdivision 16 of Section 1425 of the Penal Law, cannot be upheld. They ban the expression of subjective attitudes such as 'defiance' and 'contempt' but the statute fails to define those terms."

being disrespectful of the flag but was questioning the acts of the government and of others.

It is therefore clear that the issue of overbreadth was before the trial court and before the Court of Appeals. Appellee as well as appellant have intertwined their arguments with respect to vagueness and overbreadth. For, "As Mr. Justice Harlan pointed out in *Zwickler,* overbreadth and vagueness are not always easy or profitable to distinguish. 389 U.S. at 255-257 (concurring opinion). Statutes which suffer from one often suffer from the other." *Hodsdon* v. *Buckson,* 310 F. Supp. 528, 532 (D. Del. 1970), with a footnote to *The First Amendment Overbreadth Doctrine,* 83 Harv. L. Rev. 844, 871-76 (1970).

POINT III

Appellee's contention that the statute does not deny appellant equal protection because it permits only non-contemptuous use of the flag when disconnected from advertisements.

Appellee argues that the exception in the statute for uses of the flag in pictures, newspapers and periodicals is intended to permit only "non-contemptuous" use of the flag for those purposes, so that there is no discrimination against sculptors or against art gallery proprietors who exhibit sculpture as compared with those who exhibit paintings or as compared with publishers of newspapers or periodicals who show many cartoons[10] and pictures using the

[10] In the appendix hereto we show two examples of a genre of newspaper editorial cartoon which utilizes the flag to comment on government action in much the same fashion as the sculptures in this case (Nos. 35a, 37a).

flag, including photographs of these sculptures. There is nothing to support this in the exemption language of the statute or in the way the statute has been applied.

As the Court of Appeals stated in *Long Island Vietnam Moratorium Comm., supra,* "Although the courts should try, whenever possible, to construe statutes to avoid a constitutional infirmity, they may not, in doing so, rewrite the statute or do violence to its plain language" (—— F.2d ——). (Supp. App. to Reply Brief 8a.) Significantly, on the trial of the case, appellee conceded that if the art work had been in the form of a painting rather than a sculpture, it would have been exempt from the statute (A. 71a).

There is nothing in the language of the statute that limits the exemption to non-contemptuous use of the flag, nor did the New York Court of Appeals so find (A. 17a). On the other hand, the limitation to a use disconnected from any advertisement is explicit. The exemptions of subdivision 16 apply to all seven of its lettered subdivisions. These include the placing of a mark or design on the flag, such as a peace symbol (subparagraph a, held unconstitutional in *Long Island Vietnam Moratorium Comm.* v. *Cahn, supra*); subparagraph b. (printing a representation of a flag on any article "to decorate, mark or distinguish it"); subparagraph d, which is at issue here; and subparagraphs e, f and g.

Furthermore, the statute has never, to our knowledge, been applied to paintings, newspapers or periodicals. The Morrel exhibit at appellant's gallery included three paintings that used an American flag or an American flag motif, one of them a painting of the sculpture hanging from a noose in the gallery window (A. 79a), but these paintings

were not included in the complaint. Life Magazine printed a color photograph of this same hanging sculpture (Defendant's Exhibit A). Exhibit C shows other uses of the flag in painting and a periodical. And the Appendix to this reply brief includes magazine reproductions, editorial cartoons and many other paintings using a flag motif, including a collage which is in the collection of the Governor of the State of New York, composed of a flag upon which have been imposed potatoes, the words "Use Fork," "Idaho" and "New York," as well as a picture of Governor Rockefeller. This painting was reproduced on the cover of the New York Times Magazine prior to the sentencing of the appellant, and at the time of sentencing it was being shown in an art exhibit in New York City which was widely advertised by reproductions of this same painting. (Appendix hereto, No. 5a.)

Other examples in the appendix hereto show the flag distorted in posters and buttons on which have been imposed the faces of candidates for public office (Nos. 25a, 27a, 31a); used as the motif for women's clothing (43a); wrapped around an oil can or as the trunk of a tree whose roots, the stripes, are overrunning other countries. (Nos. 35a, 37a.)

There is thus no basis for reading into the exemption a limitation that the use must be non-contemptuous, nor do the uses that occur daily in painting and in periodicals indicate that lack of contempt has been a guideline to application of the exemption in the enforcement of the statute. The statute therefore denies appellant equal protection of the law.

POINT IV

Appellant has been prosecuted and convicted for the communication of ideas, and such a conviction cannot stand under the First Amendment.

Chief Judge Fuld, who wrote for the New York Court of Appeals in the *Street* case, succinctly summed up the case against appellant in his dissent:

> "This prosecution, in my view, is nothing more than political censorship falling far outside our holding in *People* v. *Street,* and may not be constitutionally sustained." (A. 22a; 26 N.Y.2d at 129.)

Chief Judge Lumbard noted in *Long Island Vietnam Moratorium Committee* v. *Cahn, supra,* that the statute, in effect, "requires worship of the flag by compelling a series of taboos concerning the flag display." (Supplemental App. of Unreported Cases, at 11a-12a.)

It is well known that in many primitive societies, symbols originally designed to represent a tribe and its values, gradually evolve into independent objects of veneration, existing apart from—and often at variance with—the values they were originally designed to represent. Steiner, *Taboo* (Penguin Book, 1967); Frazer, *The Golden Bough* (MacMillan & Co., Ltd., 1963), Chapters XIX-XXIII. See also, Freud, *Totem and Taboo* (W. W. Norton & Co., 1950).

Stated simply, the issue before this Court is whether our flag, originally designed to symbolize our heritage of freedom, has now become a totem whose worship can curb the very freedom it is supposed to represent.

CONCLUSION

For the reasons set forth above the statute in question should be declared unconstitutional and the appellant's conviction reversed.

Respectfully submitted,

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APPENDICES

APPENDIX I

A Brief Compendium of the Use of the American Flag by Contemporary Artists

1. WILLIAM K. ROBERTS — "Use Fork, New York—Idaho Up"
Oil and collage—1965
Collection: Governor Nelson A. Rockefeller

"Use Fork, New York—Idaho Up" currently hangs in the Executive Mansion in Albany, New York. It was exhibited in New York City at the New School for Social Research during May, 1967, in connection with a general exhibition entitled "Governor Rockefeller's Collection From the Albany Mansion." In connection with the exhibition, the work was reproduced as the cover of the New York Times Magazine for April, 1967, and the attention of the Court is respectfully invited to that cover for a full color reproduction of Roberts' work.

2. RED GROOMS — "Patriot's Parade #2"
Wood construction—1967

Red Grooms was chosen by the American Federation of Arts as one of a group of contemporary American artists, including Marc Morrel, the artist whose works are at issue herein, to illustrate the increasing use of patriotic images in American art. The exhibition, entitled "Patriotic Images in American Art", was exhibited nationally by the American Federation of Arts from October 1968-October 1969. See, *Catalogue of the American Federation of Arts* 1969-70, Exhibit #68-3, p. 47.

3. ROBERT WEAVER — "Reform Administration"
Collage—undated

"Reform Administration" is one of a series of collages by Robert Weaver prominently utilizing the American flag as an artistic and political image. Weaver's collages have attained national recognition.

4. SAM BERMAN — "Spiro T. Agnew" from "Caricatures of Six Leaders"— Ceramic construction—1969

Sam Berman is one of America's foremost political caricaturists and three dimensional cartographers. His works have been photographed in full color in Volume 5, Number 3, Issue 19 of Lithopinion, the graphic arts and public affairs of Local One of the Amalgamated Lithographers of America.

5. PAUL VON RINGELHEIM — "See the USA" Collage: fabric, acrylic on canvas—1968

Paul von Ringelheim's work was selected by the American Federation of Arts for inclusion in the exhibition entitled "Patriotic Images in American Art" which was exhibited nationally between October 1968-October 1969.

6. JASPER JOHNS — "Three Flags"— encaustic on canvas—1958 Collection of Mr. & Mrs. Burton Tremaine

Jasper Johns is perhaps the best known exponent of use of the American flag as a medium of artistic expression. "Flag on Orange Field"—1957 and "White Flag"—1955-1958 are also among his flag paintings.

7. TONY PALLADINO — "Italo-American Flag" wooden construction—undated

"Italo-American Flag" is Tony Palladino's attempt to express visually his sense of the blending of cultures which characterizes much of the American experience.

8. RUDOLPH DE HARAK — Untitled etching—1961

de Harak's etching was reproduced as the cover of "Print"—America's Graphic Design Magazine, May/June, 1961.

9. UNKNOWN — Cover—Look Magazine, July 15, 1969

10. UNKNOWN — Cover—Life Magazine, Jan. 8, 1971

The use of the flag as an artistic vehicle has not been confined to *avant garde* artists. In the commercial art area, the American flag has been consistently utilized as an eye-catching device for the effective transmission of a message. The covers of two of the largest mass circulation periodicals in America reflect the widespread use of flag art.

In connection with an extraordinarily vivid exhibition of protest art entitled "Contemporary Graphic Art in Contemporary Law and Justice", marking the Centennial Year of the Association of the Bar of the City of New York, William Weege, a Professor of Art at the University of Wisconsin, exhibited as a silk-screen print entitled "Law and Order" in which the flag is artistically utilized. The artist is currently travelling in Italy and counsel have been unable to contact him in order to secure his permission to reproduce the work. Permission has been denied by his agent because of the pall of fear which the prosecution of Steven Radich has thrown over segments of the artistic community.

The attention of the Court is invited to the Catalogue of the exhibition, which was on view during April, 1970 at the House of the Association of the Bar of the City of New York.

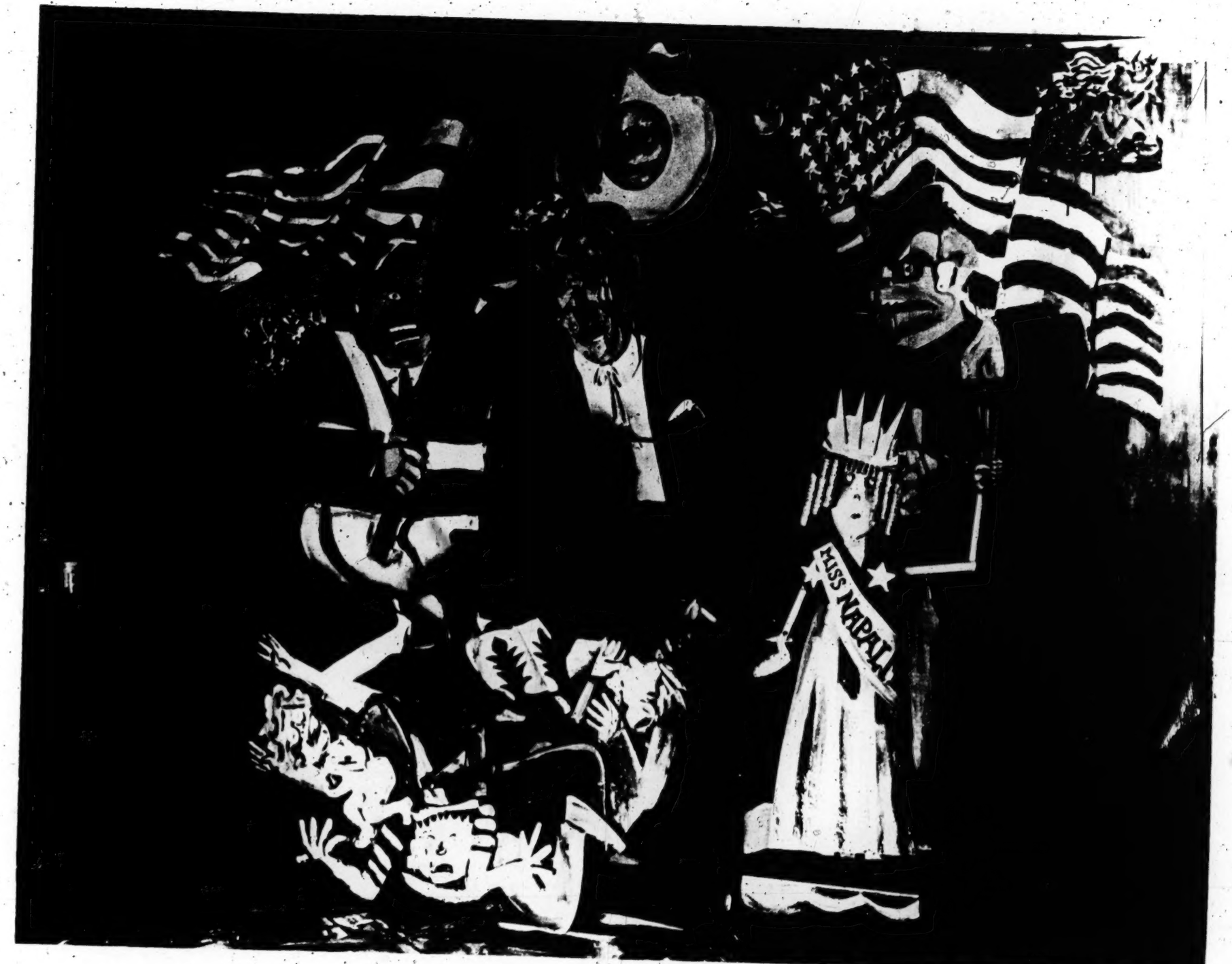
["USE FORK, NEW YORK—IDAHO UP"]
Oil and Collage by William K. Roberts

(See opposite) ☞

49. **William K. Roberts:** *Use Fork, New York - Idaho Up*

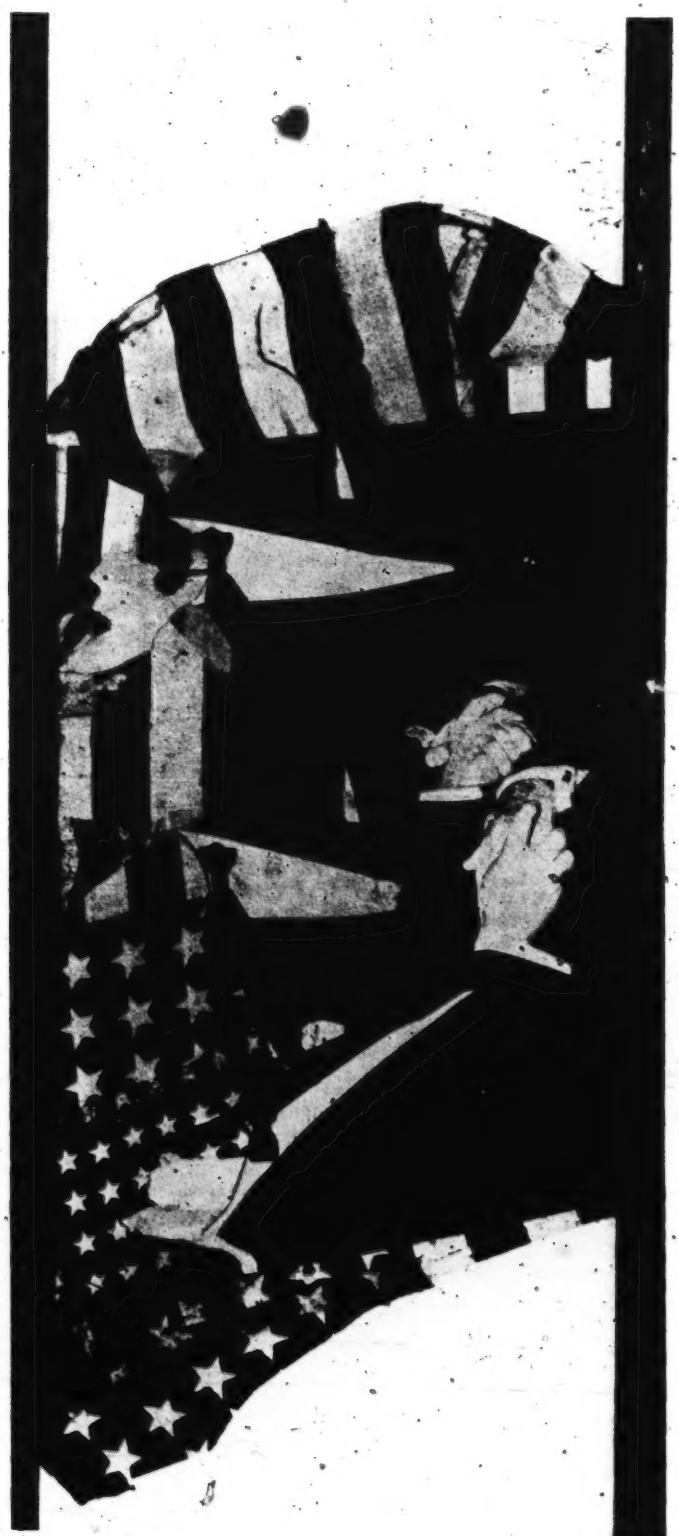
["PATRIOT'S PARADE #2"]
Wood Construction by Red Grooms

(See opposite) ☞


MISS NAPALM

["Reform Administration"]
Collage by Robert Weaver

(See opposite) ☞



10a

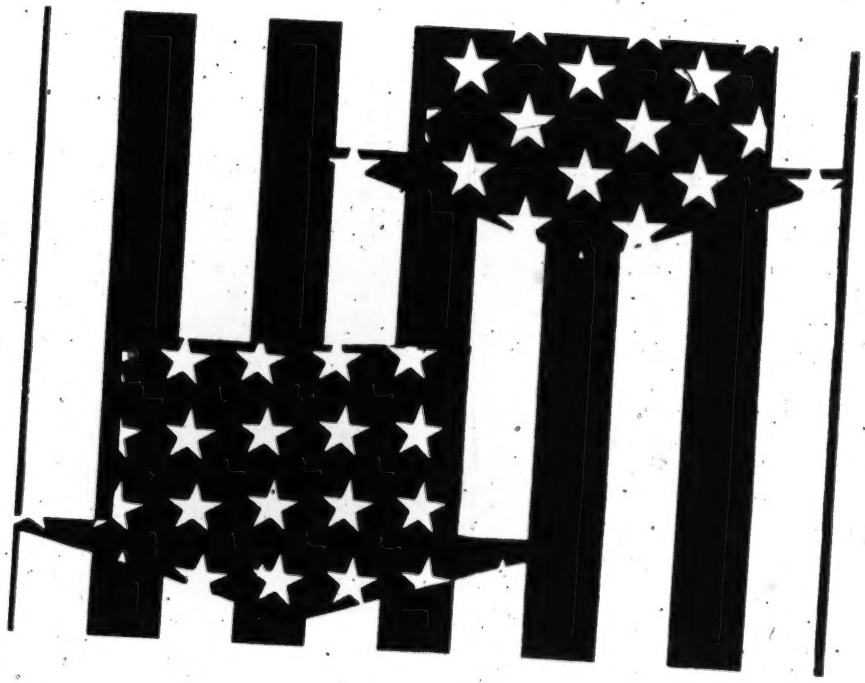
["Spiro T. Agnew" from "Caricatures of Six Leaders"]
Ceramic Construction by Sam Berman

(See opposite) ☞

IF SIR

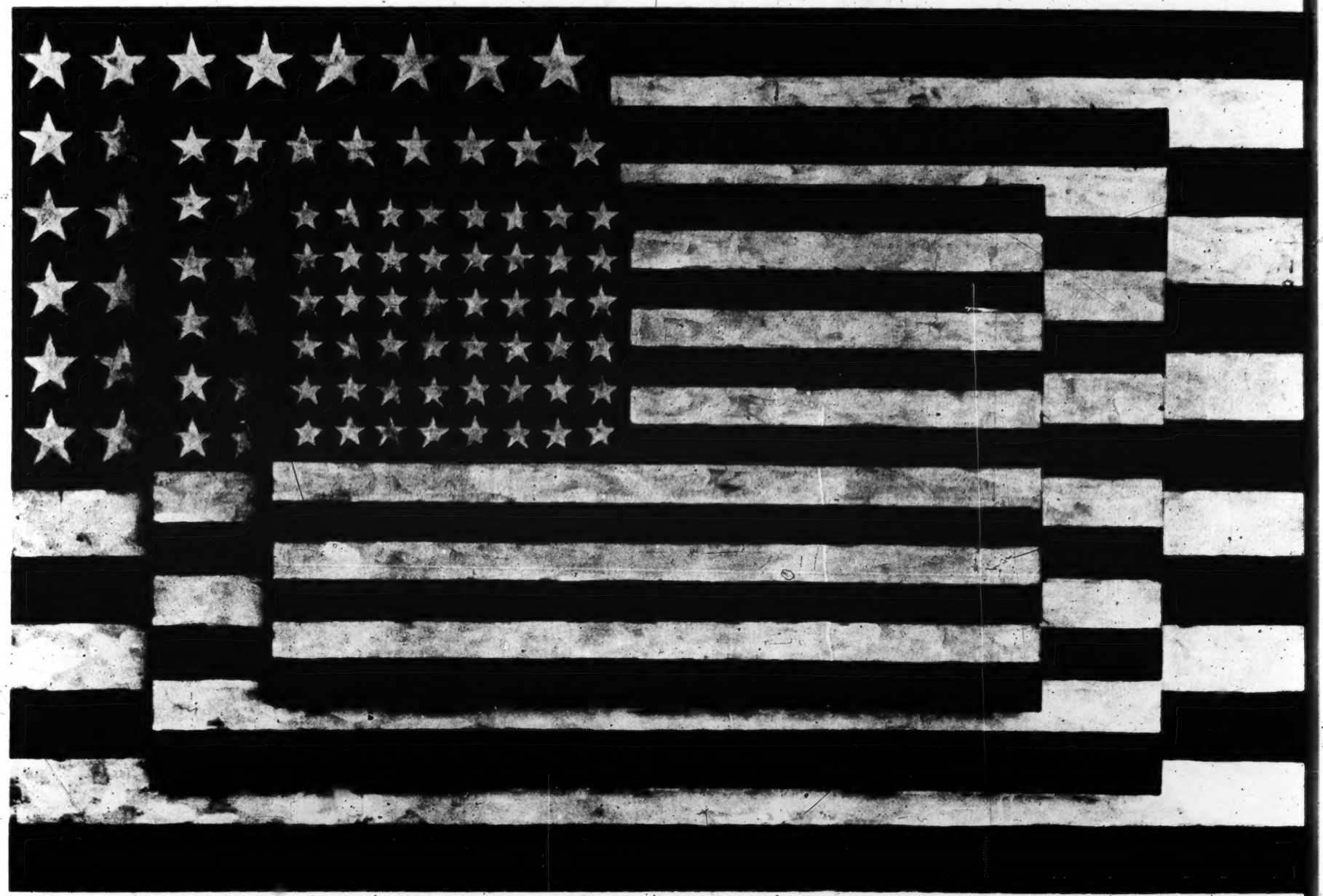
["SEE THE USA"]
Collage by Paul von Ringelheim

(See opposite) ☞



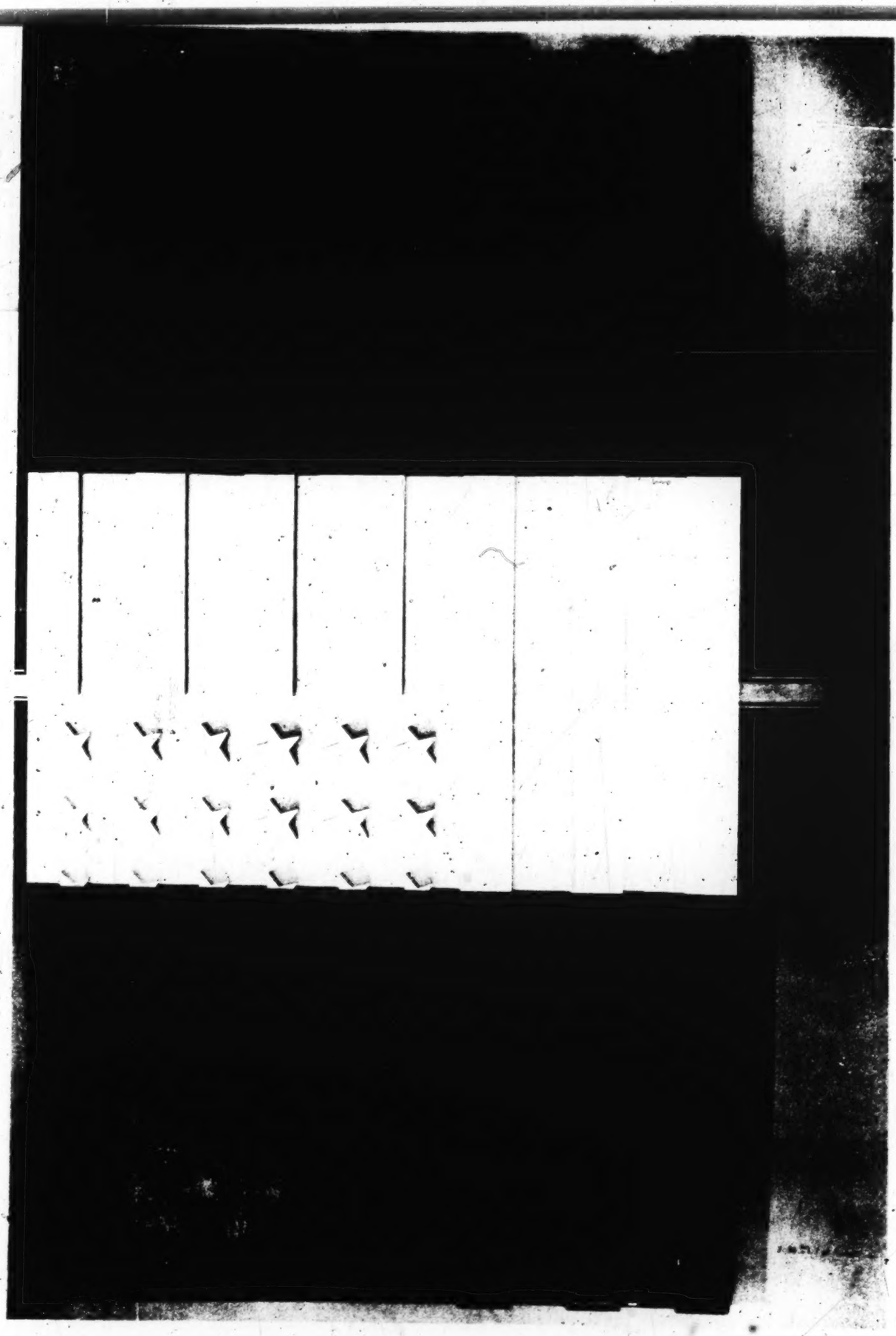
["Three Flags"]
Painting by Jasper Johns

(See opposite) ☞



["Italo-American Flag"]
Wood Construction by Tony Palladino

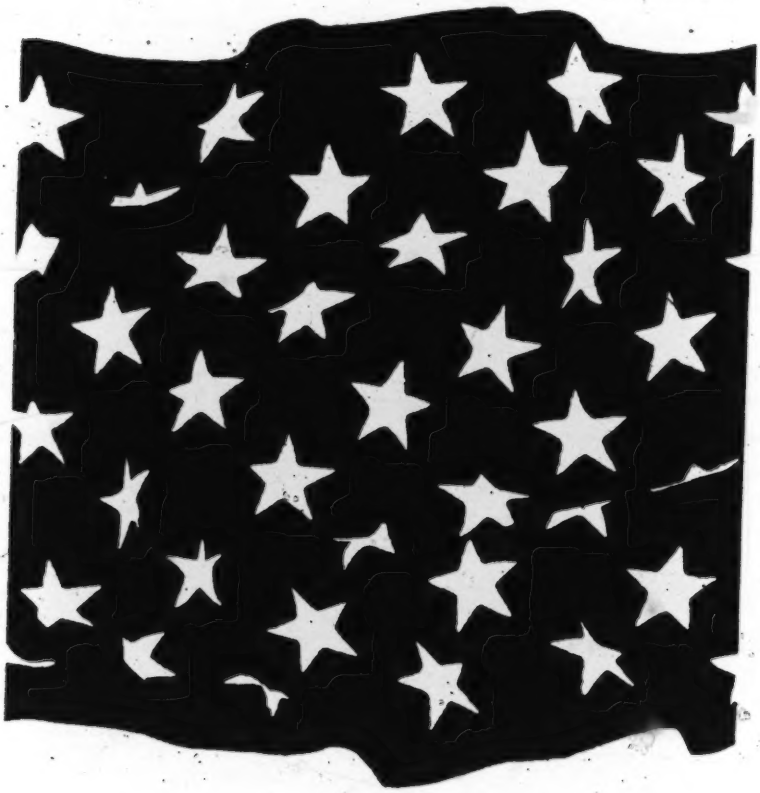
(See opposite) ☞



[Untitled Etching—1961]
by Rudolph de Harak

(See opposite) ☞

Print America'sGraphicDesignMagazine May June1961

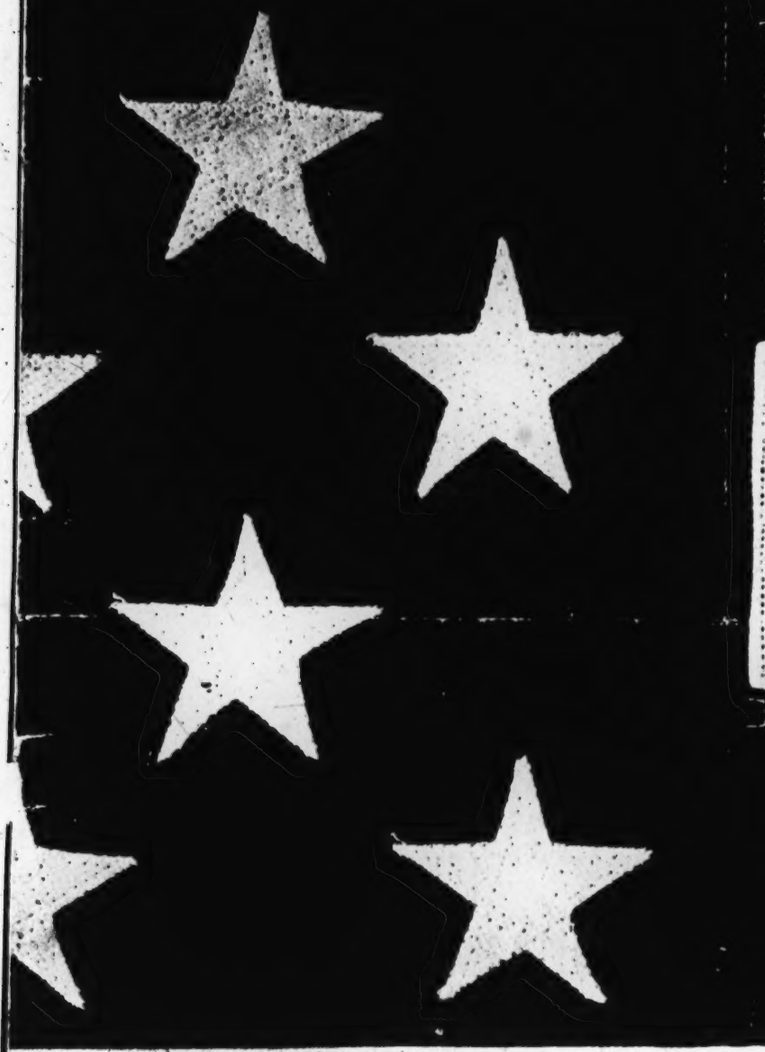


[COVER—LOOK MAGAZINE]
July 15, 1969

(See opposite) ☞

LOOK

50 CENTS · JULY 15, 1969



Apollo 11
WHAT'S BEYOND OUR FLAG ON THE MOON?

From Hanoi
TWO U.S. PRISONERS TALK

HOW HIPPIES RAISE THEIR CHILDREN

Nixon's former doctor writes about
PRESIDENTIAL STABILITY

[COVER—LIFE MAGAZINE]
January 8, 1971

(See opposite) ☞

LIFE

The New Shape of America

A Cross-Country Look

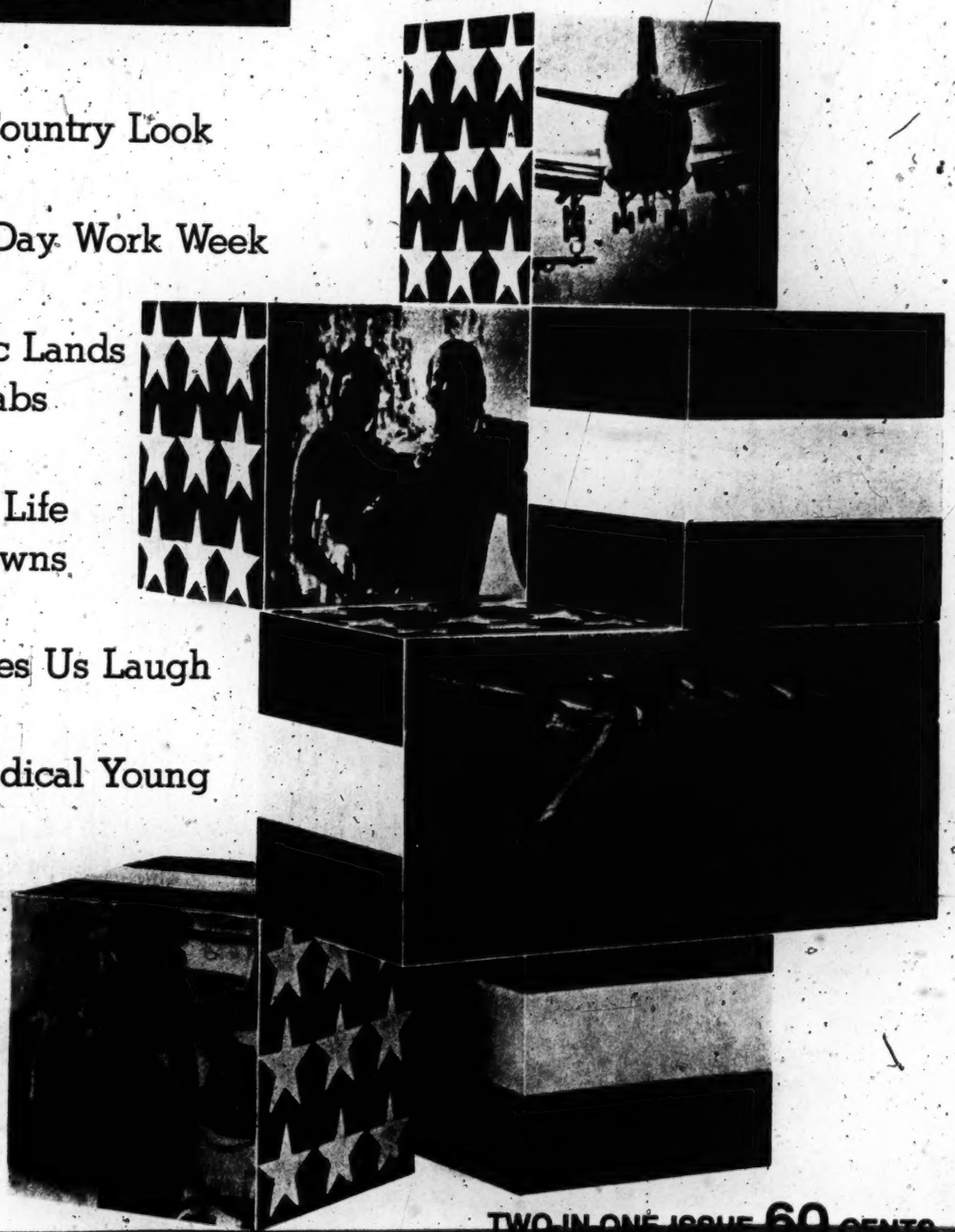
The Four-Day Work Week

Our Public Lands Up for Grabs

The Good Life in New Towns

What Makes Us Laugh

The Un-Radical Young



TWO IN ONE ISSUE 60 CENTS

APPENDIX II

A Brief Survey of the Use of the American Flag as an Aid in the Dissemination of Political Ideas

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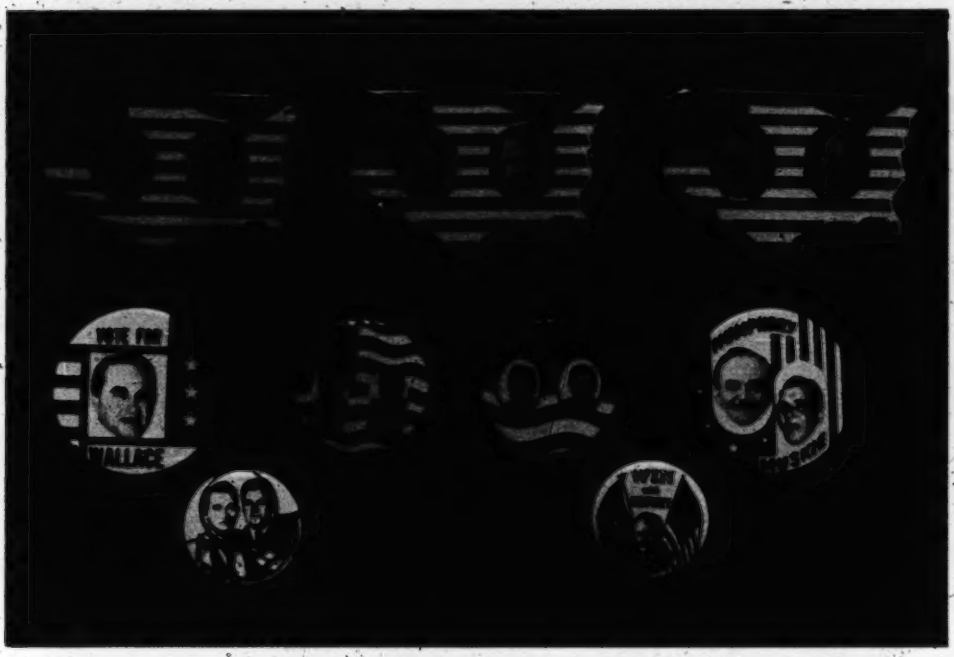
[USE OF THE AMERICAN FLAG DURING THE 1968 PRESIDENTIAL CAMPAIGN]

(See opposite) ☞

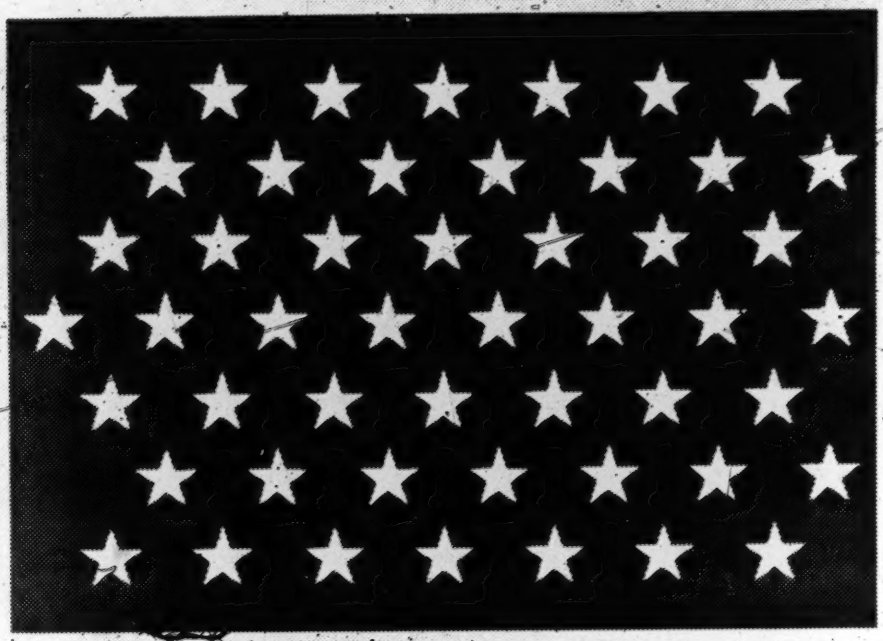

WIN WITH
WALLACE

[NIXON-AGNEW CAMPAIGN BUTTON—1968]

(See opposite) ☞

[USIA Poster—Moscow 1959]

(See opposite) ☞



АМЕРИКАНСКАЯ

ВЫСТАВКА

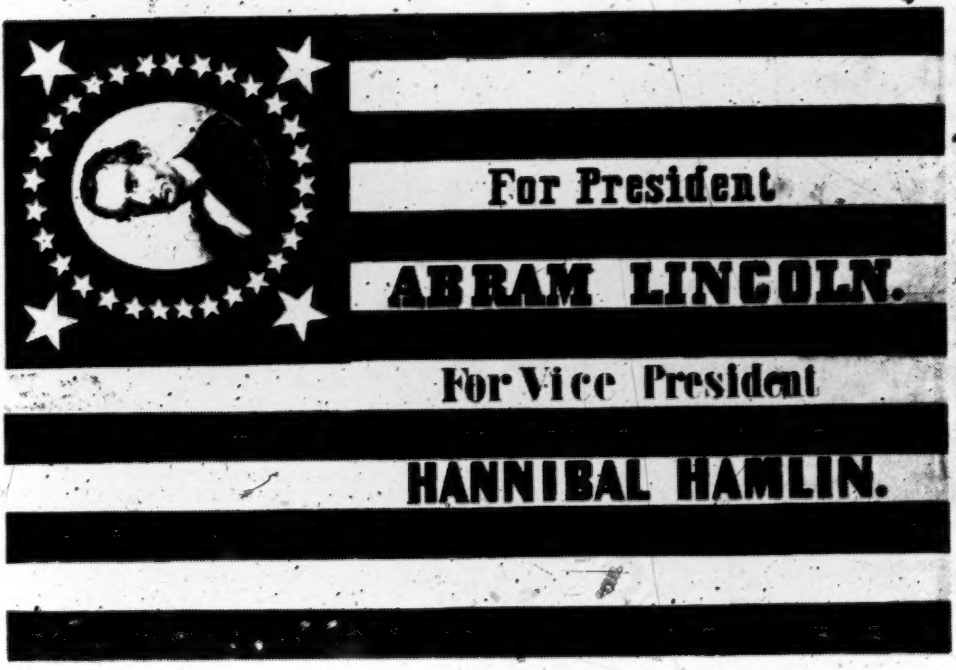
В ПАРКЕ «СОКОЛЬНИКИ»

МОСКВА. 25-го ИЮЛЯ– 1-го СЕНТЯБРЯ 1959 г.
ОТКРЫТА ЕЖЕДНЕВНО с 11.00 до 22.00 час.

Билеты продаются в театральных кассах и в кассах при входах в парк «Сокольники»
Входная плата для взрослых–1 руб., для детей и рядовых военнослужащих–50 коп.

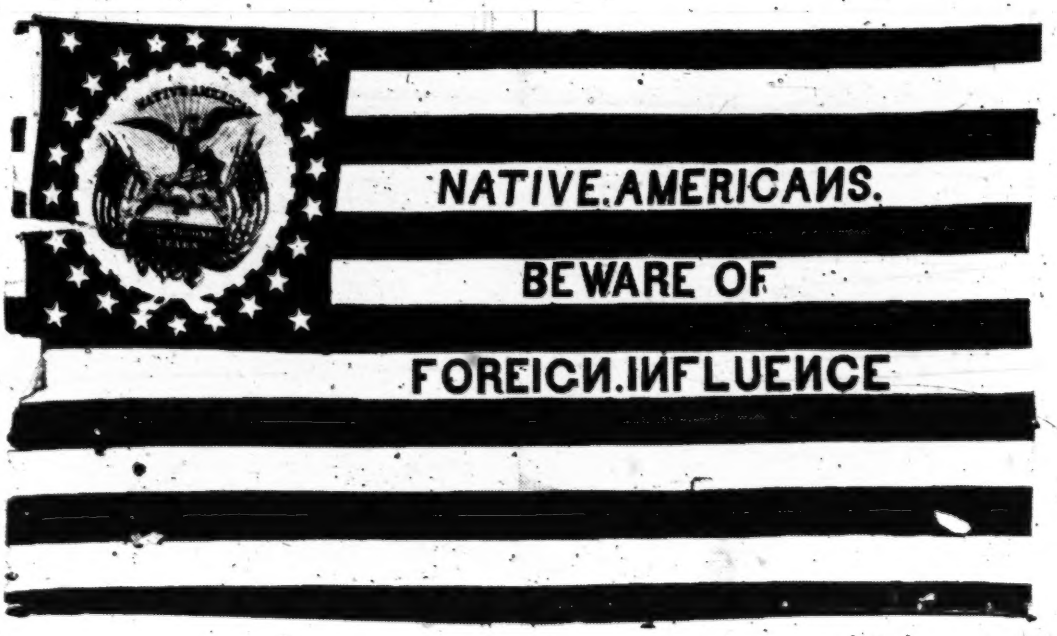
[LINCOLN-HAMLIN CAMPAIGN BANNER—1864]

(See opposite) ☞


For President
ABRAM LINCOLN.
For Vice President
HANNIBAL HAMLIN.

[CAMPAIGN BANNER—"KNOW NOTHINGS"—1844]

(See opposite) ☞


NATIVE.AMERICANS.
BEWARE OF
FOREIGN.INFLUENCE

["CAMOUFLAGE"—*Engelhardt, The St. Louis Post-Dispatch*]

(See opposite) ☞

OIL
INDUSTRY
PROFITS
'NATIONAL
SECURITY'
IMPORT
QUOTAS

[BILL MAULDIN'S CARTOON IN *New Republic*, JANUARY 9, 1971, p. 25]

(See opposite) ☞

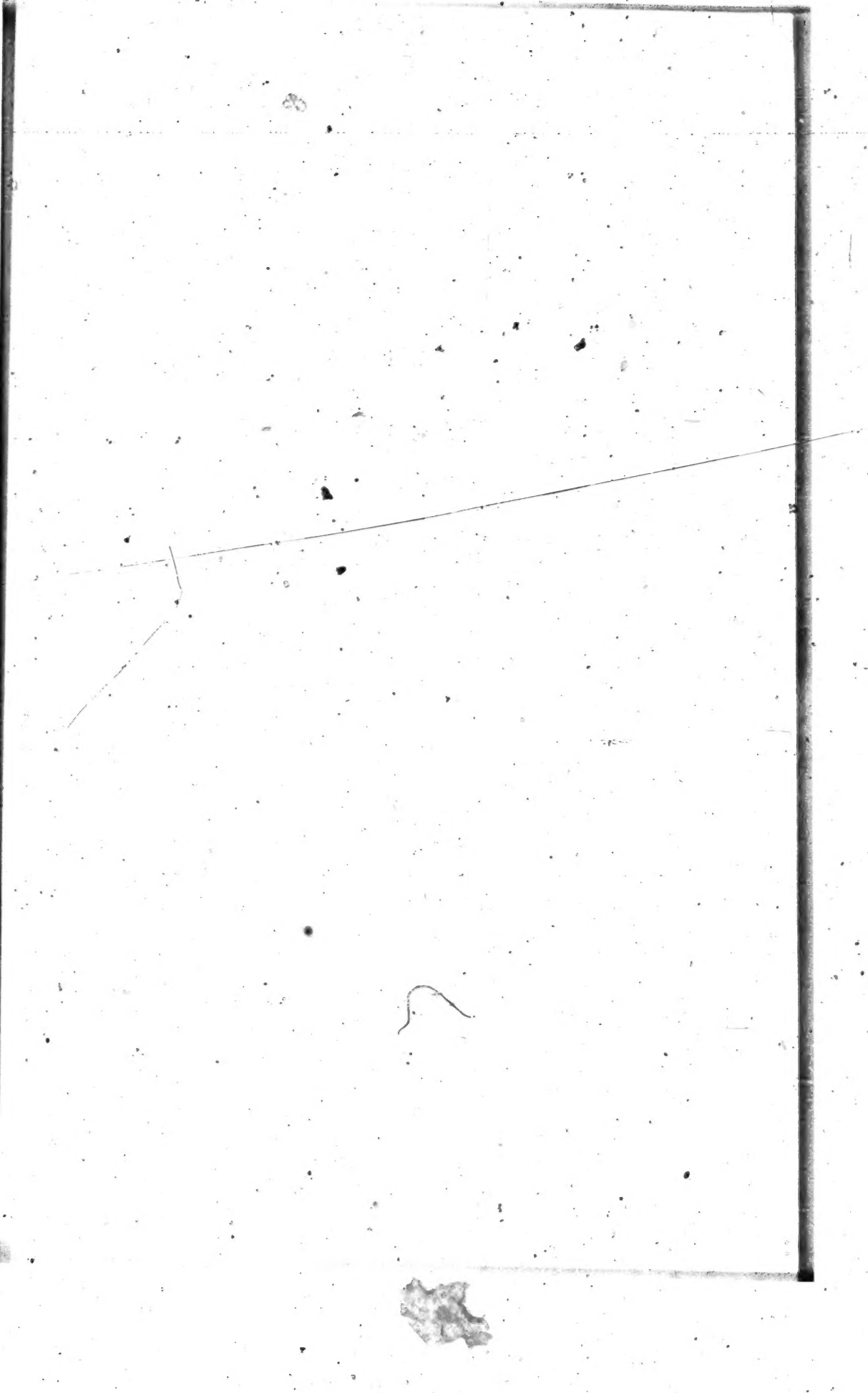
"It's become almost indigenous."

APPENDIX III

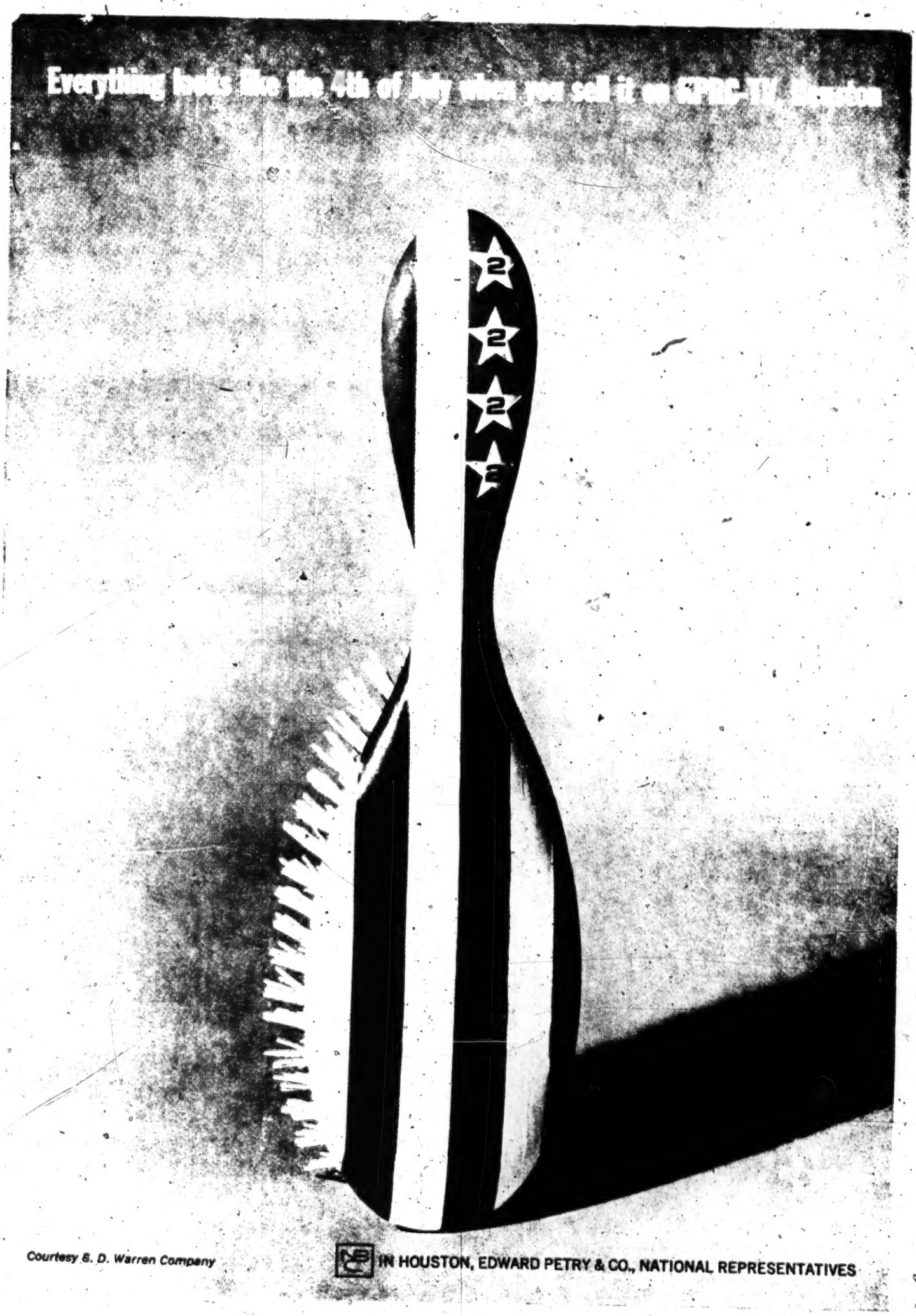
Examples of the Commercial Use of the American Flag

[ADVERTISEMENT FOR KPRC-TV IN *Broadcasting Magazine*, JULY 3, 1967]

(See opposite) ☞



Everything looks like the 4th of July when you sell it on Group W Television



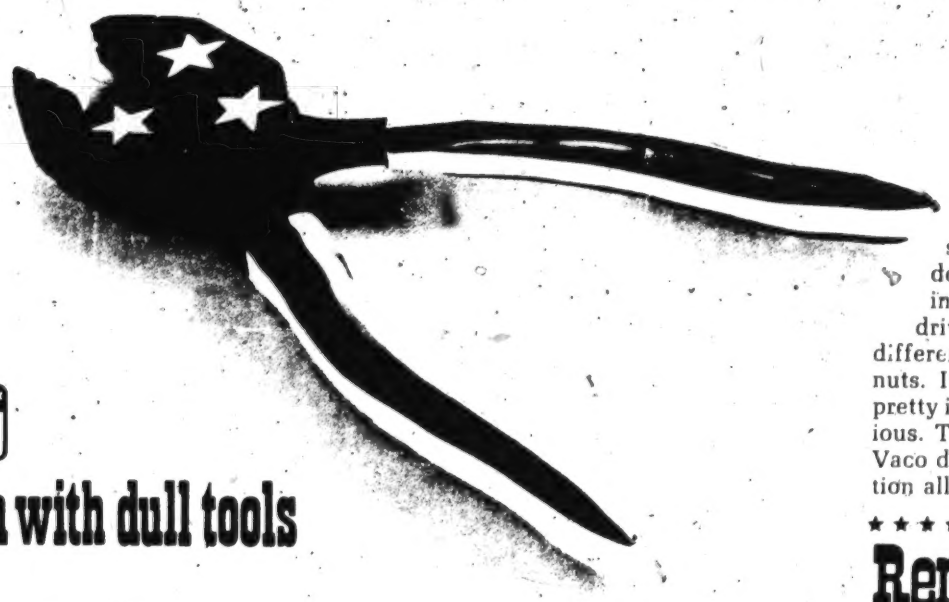
Courtesy S. D. Warren Company

IN HOUSTON, EDWARD PETRY & CO., NATIONAL REPRESENTATIVES

[ADVERTISEMENT FOR VACO PRODUCTS, INC. IN *Look Magazine*, OCTOBER 7, 1969]

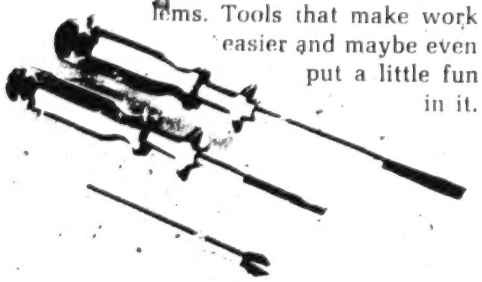
(See opposite) ☞

JOIN THE TOOL REVOLUTION !



says down with dull tools

"Sure, your great grandfather was a fine craftsman. But do you have to use the same kind of monotonous old tools he did? Vaco says no! Tools must keep up with the times! And Vaco sees that they do! We design tools to solve new problems. Tools that make work easier and maybe even put a little fun in it.

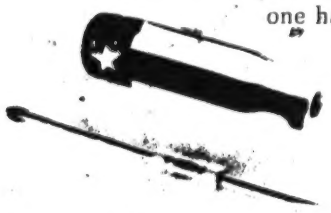


★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★

Drive onward

★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★

Vaco didn't invent the screwdriver, but we've made a lot of improvements on it. Like our famous Screw Launcher. For spots you can only reach with one hand . . . or spots where you need one hand to hold on to something.



We also make Screw Launchers for Phillips head screws, and very tiny screwdrivers and giant screwdrivers and everything in between. We even have Reversibles with a slotted blade on one end and a Phillips on the other. And then we have screwdrivers with handles that light up for circuit testing.

Wrench free

☆ ☆ ☆ ☆ ☆ ☆

Put a Vaco Plierench (like the one above) in your hip pocket, and there's a whole tool box of stuff you don't have to lug around. Because this one tool is a plier, a monkey wrench, a pipe wrench, a ratchet wrench, an end wrench. It comes with extra jaws (instantly interchangeable) for longer reach and for inside gripping. The jaws stay parallel in all positions and the Plierench has gears which multiply your hand power to a ton of gripping pressure. Yet with all this power, it treats smooth surfaces as gently as velvet. The Plierench has comfort grip handles so you don't even have to worry about blisters. Vaco has finally come to grips with the problems of America's handyman and mechanic!

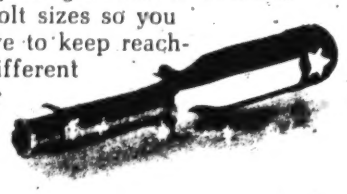
☆ ☆ ☆

Riveters arise

☆ ☆ ☆

It wasn't long ago that the only blind rivet gun used anywhere was on a factory assembly line. Now you can buy the Vaco Pow'-Riveter. A real heavy-duty tool. And Vaco Pow'Rivets . . . the first foolproof, goofproof rivets that are guaranteed to clamp up tight — dust-tight and water-tight — every time, even in oversize holes.

Here's another smart tool . . . a self-adjusting nutdriver that fits seven bolt sizes so you don't have to keep reaching for different drivers for different size nuts. It's pretty ingenious. These Vaco drivers start a tool revolution all by themselves. But there's more.



★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★

Remember the bolt

★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★

Here's the tool that makes solderless terminals a real joy to work with. It not only crimps the terminals, with or without insulators on them, but cleanly strips all common wire sizes. It does something else that comes in pretty handy too. It cuts six different sizes of bolts. So clean you don't have to touch a file to them. Try that with a hacksaw.

Maybe all you want is a Wire Stripper. One that's extra easy to work with. This is it. Dial-A-Gauge. Turn the cam and strip wire all day with never a nick.

Go With VACO

★ ★ ★ ★ ★

To wrap it all up, every tool that Vaco makes is absolutely, positively and unconditionally guaranteed. Forever.

And you can't get much more revolutionary than that.

VACO Products Co., Chicago, Ill. 60610

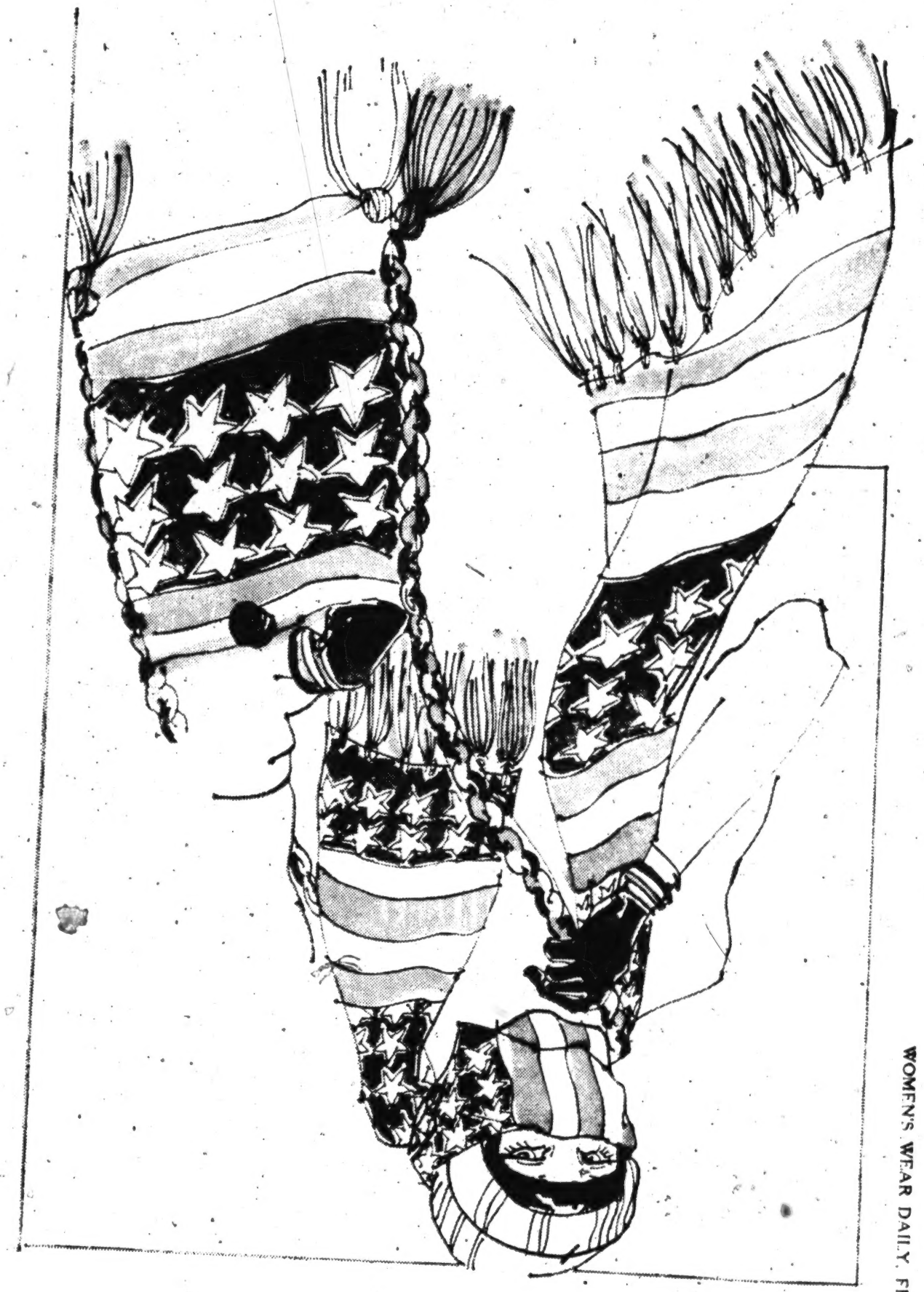
★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★

See the tool revolution where you see this poster

★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★

[ILLUSTRATION OF FLAG FASHION FROM *Women's Wear Daily*, APRIL 17, 1970]

(See opposite) ☞



FLAG FASHION

Supreme Court, U.S.
FILED
APR 19 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 169

STEPHEN RADICH,

Appellant,

—v.—

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR REHEARING

RICHARD G. GREEN
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212—246-8689

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84 Fifth Avenue
New York, New York 10011

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156 Fifth Avenue
New York, New York 10010

Attorneys for Appellant

JURISDICTIONAL STATEMENT FILED MAY 18, 1970
PROBABLE JURISDICTION NOTED OCTOBER 19, 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 169

STEPHEN RADICH,

Appellant,

—v.—

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR REHEARING

Stephen Radich, the petitioner herein, respectfully moves this Court for an order (1) vacating its affirmance of the decision below by an equally divided Court and (2) setting the instant case for reargument. As grounds for this motion, petitioner states the following:

I.

Petitioner suggests that it would be appropriate for the entire Court to participate in the consideration and decision of this case.

Petitioner's conviction for casting contempt upon the American flag was affirmed by an equally divided Court on March 24, 1971. Mr. Justice Douglas took no part in the consideration or decision of the case.

Petitioner is unaware of the basis for Mr. Justice Douglas' conclusion that his participation in the consideration or decision of this case would be inappropriate. However, it has been suggested that Mr. Justice Douglas' abstention might have stemmed from a reluctance to sit on cases involving those accused of flag desecration because he had publicly expressed personal disapproval of them. Petitioner respectfully suggests that such an expression of personal disapproval does not require his disqualification, and earnestly requests that this case be rescheduled for argument before the entire Court. Petitioner has no doubts whatever concerning the ability of any member of this Court to dissociate his personal beliefs from his view of the merits of a given constitutional issue. Petitioner has faith in Mr. Justice Douglas' ability to render dispassionate justice in this case.

Disposition of a criminal appeal raising serious constitutional questions by an equally divided Court is, we believe, an unsatisfactory method of dispensing justice. In such case it is not unprecedented for reargument to be granted by the entire Court including the Justice who initially did not participate. E.g. *Bartkus* v. *Illinois*, 355 U.S. 281 (1958), rehearing granted, 356 U.S. 969 (1958), conviction affirmed, 359 U.S. 121 (1959); *Ladner* v. *United States*, 355 U.S. 282 (1958), rehearing granted, 356 U.S. 969 (1958), conviction reversed, 358 U.S. 169 (1958).

In *Bartkus* and *Ladner*, Mr. Justice Brennan did not participate in the initial affirmance of the respective convictions by an equally divided Court, because he had been a member of the Court below in *Hoag* v. *New Jersey*, 356 U.S. 464 (1958), a companion case raising similar issues

of double jeopardy. Once *Hoag* was decided, however, Mr. Justice Brennan participated in the subsequent reargu-ments and opinions in *Bartkus* and *Ladner,* thereby permitting the Court to dispose of those cases by a majority vote.

We recognize that in the cases cited above there was an intervening circumstance which does not exist in this case. However, a re-evaluation by Mr. Justice Douglas of his refusal to participate can serve the same function, thereby enabling the Court on rehearing to pass on the constitutional issues.

II.

Petitioner suggests that an equally divided Court should not result in the affirmance of a criminal conviction raising substantial constitutional issues.

Petitioner recognizes that this Court has affirmed the judgment of the lower court in those rare instances when it is equally divided on the merits of an appeal. E.g. *The Antelope,* 10 Wheat 66, 126 (1825); *Etting* v. *United States Bank,* 11 Wheat 59 (1826); *Durant* v. *Essex Company,* 7 Wall (U.S.) 107 (1868); *Hertz* v. *Woodman,* 218 U.S. 205 (1910); *United States* v. *Pink,* 315 U.S. 203 (1942); *Raley* v. *Ohio,* 360 U.S. 423 (1950); *Ohio ex rel. Eaton* v. *Price,* 364 U.S. 263 (1960); *In re Spencer* 397 U.S. 817 (1970). Although the divided affirmance result evolved in the context of civil litigation, it has been applied to criminal cases. Petitioner respectfully suggests that given the philosophical and jurisprudential concepts of our criminal law (Cf. *In re Winship,* 397 U.S. 358 (1970)), this Court should reconsider the effect of the Court's inability to reach a ma-

jority in those few criminal cases raising constitutional issues of such substance and difficulty that the Court is equally divided on their merits.

This Court has ruled that before the State may impose criminal sanctions upon an individual, it must convince the finder of fact of his guilt beyond a reasonable doubt. E.g. *Brinegar* v. *United States,* 338 U.S. 160, 174 (1949); *Speiser* v. *Randall,* 357 U.S. 513, 525-526 (1958); *In re Winship,* 397 U.S. 358 (1970). The purposes of requiring a reasonable doubt rule in a criminal case were eloquently summarized by Mr. Justice Brennan in *In re Winship, supra,* when he wrote:

> "The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt."
>
> * * * * *
>
> "Moreover . . . It is critical that the moral force of the criminal law not be diluted by a standard of proof which leaves people in doubt whether innocent men are being condemned." 397 U.S. at 363-4.

The underlying principle expressed in *Winship,* that the inertial benefit rest with the accused in criminal cases,

should be applicable to questions of law as well as issues of fact. Where the issues of law upon which guilt or innocence depend are so close that this Court is equally divided as to their proper resolution, we respectfully urge that fundamental fairness requires that the inertial benefit should rest with the accused and that the conviction should be reversed. Due regard for the "good name and freedom of every individual" and for the "moral force of the criminal law" demand that a criminal conviction which raises significant issues of constitutional law should be affirmed only when a majority of this Court concur.

CONCLUSION

For the reasons set forth above, petitioner prays that this Court grant rehearing of the order of affirmance of the Court of Appeals of the State of New York, vacate that order, and set the case for reargument.

Respectfully submitted,

RICHARD G. GREEN
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New York, New York 10020
212—246-8689

BURT NEUBORNE
84 Fifth Avenue
New York, New York 10011

MELVIN L. WULF
156 Fifth Avenue
New York, New York 10010

Attorneys for Appellant

Certificate of Counsel

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay.

RICHARD G. GREEN

RADICH *v.* NEW YORK

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 169. Argued February 22, 1971—Decided March 24, 1971

26 N. Y. 2d 114, 257 N. E. 2d 30, affirmed by an equally divided Court.

Richard G. Green argued the cause for appellant. With him on the briefs were *Shirley Fingerhood* and *Melvin L. Wulf.*

Michael R. Juviler argued the cause for appellee. With him on the brief were *Frank S. Hogan* and *William C. Donnino.*

John B. Hightower et al. filed a brief as *amicus curiae* urging reversal.

Louis J. Lefkowitz, Attorney General, *pro se, Samuel A. Hirshowitz,* First Assistant Attorney General, and *Maria L. Marcus,* Assistant Attorney General, filed a brief for the Attorney General of New York as *amicus curiae* urging affirmance.

PER CURIAM.

The judgment is affirmed by an equally divided Court.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.